

Title: Ingalls Shipbuilding, Inc., et al., Petitioners  
v.  
Director, Office of Workers' Compensation Programs,  
Department of Labor, et al.

Docketed:

January 9, 1996

Court: United States Court of Appeals for  
the Fifth Circuit

Entry Date

Proceedings and Orders

Entry	Date	Proceedings and Orders
Jan 2	1996	Petition for writ of certiorari filed. (Response due April 10, 1996)
Feb 5	1996	Order extending time to file response to petition until March 11, 1996.
Feb 5	1996	This extension is granted for all respondents.
Mar 8	1996	Order further extending time to file response to petition until April 10, 1996.
Mar 11	1996	Brief of respondent Maggie Yates in opposition filed.
Apr 10	1996	Brief for the Federal Respondent filed.
Apr 24	1996	DISTRIBUTED. May 10, 1996
May 8	1996	Reply brief of petitioners filed.
May 13	1996	Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
		SET FOR ARGUMENT November 12, 1996.
		*****
May 24	1996	Motion of the parties to dispense with printing the joint appendix filed.
May 31	1996	Record filed.
Jun 10	1996	Motion of the parties to dispense with printing the joint appendix GRANTED.
Jun 26	1996	Brief of petitioners Ingalls Shipbuilding, Inc., et al. filed.
Jun 26	1996	Brief amici curiae of National Association of Waterfront Employers, et al. filed.
Jun 27	1996	Brief amicus curiae of Bethlehem Steel Corporation filed.
Jul 26	1996	Order extending time to file brief of respondent on the merits until August 20, 1996.
Aug 16	1996	Brief amicus curiae of Asbestos Victims of America filed.
Aug 20	1996	Brief of respondent Maggie Yates filed.
Aug 20	1996	Brief the Federal Respondent filed.
Sep 4	1996	Motion of the Acting Solicitor General for divided argument filed.
Sep 9	1996	CIRCULATED.
Sep 16	1996	Opposition of petitioners to motion of the Acting Solicitor General for divided argument filed.
Sep 16	1996	Record filed.
Sep 19	1996	Reply brief of petitioners Ingalls Shipbuilding, Inc., et al. filed.
Oct 15	1996	Motion of the Acting Solicitor General for divided argument GRANTED.
Nov 8	1996	Letter from the Solicitor General concerning Rule 15.4 received and distributed.
Nov 8	1996	Response to the letter of the Solicitor General received from counsel for the petitioners and distributed.
Nov 12	1996	ARGUED.

①  
**95-1081**

No. \_\_\_\_\_

Supreme Court, U. S.

**FILED**

**JAN 2 1996**

CLERK

**In The  
Supreme Court of the United States  
October Term, 1995**

**INGALLS SHIPBUILDING, INC. AND AMERICAN  
MUTUAL LIABILITY INSURANCE COMPANY, IN  
LIQUIDATION, BY AND THROUGH THE MISSISSIPPI  
INSURANCE GUARANTY ASSOCIATION,**

*Petitioners,*

**versus**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, U. S. DEPARTMENT OF LABOR, AND  
MAGGIE YATES (Widow of Jefferson Yates),**

*Respondents.*

**Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit err in failing to follow the holding of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993); *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705, 129 L. Ed. 2d 833 (1994), when the Fifth Circuit held that a potential widow is not a "person entitled to compensation" when she enters into a third party settlement of her potential wrongful death cause of action, without the consent of the employer and carrier, prior to the death of her husband pursuant to § 33(g) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*?

2. Did the United States Court of Appeals for the Fifth Circuit err in concluding, contrary to the ruling of the United States Court of Appeals for the Fourth Circuit in *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903 (4th Cir. 1976) (*en banc*), *vacated sub nom. Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904, 97 S.Ct. 2967, 53 L. Ed. 2d 1088 (1977), *reaffirmed en banc*, *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977), that the Director of the Office of Workers' Compensation Programs, U.S. Department of Labor, has standing to actively respond to the employer and carrier's appeal of a ruling in a case in which the Director has no interest?

3. Does § 33(f) of the Longshore and Harbor Workers' Compensation Act allow the employer and carrier to set off or reduce their liability for death benefits by amounts received by the non-dependent heirs-at-law from third party defendants?

## QUESTIONS PRESENTED – Continued

4. Did the United States Court of Appeals for the Fifth Circuit err in failing to adopt the Administrative Law Judge's decision that contractual and legally enforceable bases existed which allowed the employer and carrier to set off their liability to the widow under the Longshore and Harbor Workers' Compensation Act in the amount of the third party recoveries received by both the widow and non-dependent heirs-at-law?

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## PETITION FOR WRIT OF CERTIORARI

COME NOW, the Petitioners, Ingalls Shipbuilding, Inc.,<sup>1</sup> and American Mutual Liability Insurance Company, in liquidation, by and through the Mississippi Insurance Guaranty Association (hereinafter collectively "Ingalls"), and pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 3, 1995.

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 OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, upon which certiorari is requested, was entered on October 3, 1995, is reported at 65 F.3d 460, and is reprinted herein at App. 1-17. Petitioners' Suggestion for Rehearing *En Banc* of said decision was denied on November 22, 1995. (App. 18-19) The Fifth Circuit's October 3, 1995, decision affirms the majority decision of the Benefits Review Board in *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994), reprinted herein at App. 20-55. The Benefits Review Board's decision affirmed in part and reversed in part the decision of the Administrative Law Judge in *Yates v. Ingalls Shipbuilding, Inc.*, 26 BRBS 174 (ALJ) (1992), which is reprinted herein at App. 56-88.

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<sup>1</sup> Ingalls Shipbuilding, Inc., is a subsidiary of Litton Industries, Inc.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 3, 1995. As this Petition is filed within 90 days of that judgment, it is timely. U.S. Supreme Court Rule 13.1. Jurisdiction of this Court to review the decision of the Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. § 1254(1).

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## STATUTES INVOLVED

The instant matter involves interpretations of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901, *et seq.* The specific portions of the LHWCA which are pertinent to the instant matter involve 33 U.S.C. § 933(f) and 33 U.S.C. § 933(g), which are reprinted herein at App. 89-90.

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## STATEMENT OF THE CASE

The decedent, Jefferson Yates, was allegedly exposed to asbestos in the course and scope of his employment with Ingalls Shipbuilding, Inc.<sup>2</sup> On March 23, 1981, he was diagnosed as having an asbestos-related disease. On April 16, 1981, he filed a claim for compensation against

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<sup>2</sup> The workers' compensation carrier for co-petitioner Ingalls was American Mutual Liability Insurance Company, which is now in receivership. Its obligations for payment of benefits under the LHWCA have been assumed by the other co-petitioner herein, The Mississippi Insurance Guaranty Association.

Ingalls under the LHWCA. On May 26, 1981, his attorneys, on his behalf, filed a lawsuit in the United States District Court, for the Southern District of Mississippi, Southern Division, against the 23 manufacturers of asbestos products to which the decedent was allegedly exposed at Ingalls.

Between May 1981 and January 1984, Mr. and Mrs. Yates, while being represented by the same attorneys who represented Mr. Yates in his LHWCA claim against Ingalls, entered into eight settlements with certain asbestos manufacturers without the consent of Ingalls. Mr. and Mrs. Yates executed releases in conjunction with the third party settlements. In six of the eight settlements which were not approved by the employer and carrier in accordance with § 33(g) of the LHWCA, Mrs. Yates released any future claim she may have had for the wrongful death of her husband.

Mr. Yates died of his asbestos-related condition on January 28, 1986. On April 22, 1986, Mrs. Yates, respondent herein, filed a compensation claim for death benefits against Ingalls under § 909 of the LHWCA. Mrs. Yates and her six adult children, represented by the same attorneys who represented her in her LHWCA claim against Ingalls, continued to pursue settlements against third party defendants as a result of the decedent's injury and/or wrongful death. They settled with third party defendants Raymark, Wellington, and Johns Manville after decedent's death for an average net amount of approximately \$21,225.00 per settlement, which was equally divided among Mrs. Yates and her six adult children. They, likewise, executed releases forever discharging these defendants.



Also, in those settlements, Mrs. Yates and her adult children agreed that Ingalls would be entitled to a credit or offset in the entire amount of all sums received from the third party defendants. For example, the release executed in favor of Wellington in exchange for the sum of \$60,000.00, specifically stated:

*The undersigned do hereby represent and warrant to releasees that whether there is now pending any claim for workers' compensation benefits under state or federal law or statute, or if any such claims shall hereafter be filed and be successful and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to either of the undersigned shall first be given credit for the consideration paid to the undersigned under this agreement, less reasonable cost of collection and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted. (emphasis added.)*

The release executed in favor of third party defendant Raymark Industries, Inc. contained similar language.

In addition to the release executed in the Wellington settlement, an order was entered by the United States District Court for the Southern District of Mississippi, Southern Division, approving the third party settlement, in which the court stated:

(2) That the aforesaid settlement be, and it is hereby approved, providing, however, that in

*any claim pending or hereafter filed by the plaintiff, the decedent's heirs or anyone in privity with them under the Mississippi Workers' Compensation Act, the Longshoreman and Harbor Workers' Act, or any other law which provides benefits to be paid to the plaintiff or the other "wrongful death" beneficiaries of Jefferson T. Yates, deceased, arising out of Jefferson T. Yates, deceased's employment, and any such employer or its insurance carrier be ordered to pay such benefits as a result of any matter, fact, or thing appearing in the complaint filed in this cause, then, pursuant to the applicable compensation act, such employer and/or insurance carrier shall first be given credit for the net amount of the aforesaid sum accruing to the plaintiff and the other "wrongful death" beneficiaries of Jefferson T. Yates, deceased. (emphasis added.)*

Based on the Yates' representations in the settlement papers, the court order and on the LS-33 forms<sup>3</sup> which stated that Ingalls would be entitled to a credit in the full amount paid by the settling defendants to all plaintiffs, Ingalls approved these post-death third party settlements for an average amount much greater than the settlements consummated prior to decedent's death.

Ingalls subsequently controverted the LHWCA death claim of Mrs. Yates because she failed to obtain the consent of Ingalls to the eight third party settlements entered

<sup>3</sup> Section 33(g) provides in part that an employer's approval of any third party settlement "shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner . . ." See also 20 C.F.R. § 702.281(b). The referenced form from the Department of Labor is designated as an LS-33 Form.

into by her and her husband before his death. Alternatively, Ingalls asserted that it was entitled, as a matter of law, to set off its liability, if any, to Mrs. Yates, by all net amounts paid by the third party asbestos manufacturers after the death of Mr. Yates. Finally, Ingalls asserted that the third party releases, the court order, and the LS-33 forms gave Ingalls contractual and legally enforceable bases to set off or reduce its liability under the LHWCA by the net amount received by Mrs. Yates and her adult children from the third party asbestos manufacturers.

#### **The Decision of the Administrative Law Judge**

On April 23, 1992, the Administrative Law Judge under the LHWCA entered his order finding that the widow's claim of Mrs. Yates for death benefits against Ingalls was not barred by her unapproved third party settlements prior to decedent's death as he concluded that Mrs. Yates was not a "person entitled to compensation" under § 33(g) of the LHWCA at the time of the settlements. (App. 71) The ALJ also held that although the LHWCA did not require that Ingalls receive a set-off or reduction of its compensation liability under the LHWCA by amounts received by Mrs. Yates and her adult children in the third party litigation, in this particular case, they had contractually agreed in the releases to allow Ingalls such a set-off. Accordingly, the ALJ, citing *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987), found that Ingalls was entitled to such a set-off. (App. 84-86)

#### **The Decision of the Benefits Review Board**

On June 29, 1994, the Benefits Review Board entered its decision based upon the claimant's appeal and Ingalls' cross-appeal of the Administrative Law Judge's decision. (App. 20-55) The Benefits Review Board affirmed the Administrative Law Judge's holdings that the widow's claim was not barred pursuant to § 33(g), and that the LHWCA did not allow an employer a credit for amounts received in third party litigation by non-dependent heirs-at-law. (App. 36-37, 42) The Board, however, with one dissent, reversed the Administrative Law Judge's holding that there was a contractual basis for granting Ingalls a credit for amounts received by both the widow and her adult children from the third party defendants. (App. 43-45, 53-55)

#### **The Decision of the U.S. Court of Appeals for the Fifth Circuit**

Ingalls appealed the Benefits Review Board's decision to the U.S. Court of Appeals for the Fifth Circuit, pursuant to 33 U.S.C. § 921(c). On October 3, 1995, the Fifth Circuit rendered its decision affirming the decision of the Benefits Review Board. (App. 1-17) In its decision, a panel of the Fifth Circuit, citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L. Ed. 2d 379 (1992), held that a wife's claim for death benefits under the LHWCA did not vest until the employee's death, and thus she was not a "person entitled to compensation" who must comply with the terms of § 33(g) until after the decedent's death. (App. 9-11) In reliance on interpretations of § 33(f) in the Ninth and Fourth Circuits,



the Fifth Circuit held that Ingalls was only entitled to offset its liability under the LHWCA by amounts received by Mrs. Yates and not by the full net amount paid by the third party defendants. (App. 12-13) Next, the panel held that the releases signed by Mrs. Yates and her adult children did not "clearly and unambiguously" allow Ingalls to offset its liability for death benefits by third party amounts received by the children. (App. 14-16) Finally, the panel held that the Director, Office of Workers' Compensation Programs, U.S. Department of Labor, had standing to participate in this appeal as a respondent pursuant to *Ingalls Shipbuilding, Div. Litton Systems, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982), reversed on other grounds, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir. 1984), cert. denied, 469 U.S. 818 (1984), which the panel held was unaffected by the U.S. Supreme Court's recent decision in *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. \_\_\_, 115 S.Ct. 1278, 131 L. Ed. 2d 160 (1995), which denied standing of the Director to appeal a claim in which it had no cognizable interest. (App. 6)

It is from the decision of the Court of Appeals for the Fifth Circuit that Ingalls seeks a writ of certiorari from this Court.

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## ARGUMENT

1. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN FAILING TO FOLLOW THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *CRETAN V. BETHLEHEM STEEL CORP.*, 1 F.3d 843 (9TH CIR. 1993); CERT. DENIED, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705, 129 L. Ed. 2d 833 (1994), WHEN THE FIFTH CIRCUIT HELD THAT A POTENTIAL WIDOW IS NOT A "PERSON ENTITLED TO COMPENSATION" WHEN SHE ENTERS INTO A THIRD PARTY SETTLEMENT OF HER POTENTIAL WRONGFUL DEATH CAUSE OF ACTION, WITHOUT THE CONSENT OF THE EMPLOYER AND CARRIER, PRIOR TO THE DEATH OF HER HUSBAND PURSUANT TO § 33(G) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. § 901 ET SEQ.?

Before his death, Mr. and Mrs. Yates entered into eight third party settlements without the consent of Ingalls. In six of them, Mrs. Yates released all future claims she might have had for the wrongful death of her husband. By entering into these third party settlements without Ingalls' consent pursuant to § 33(g) of the LHWCA, Mrs. Yates effectively terminated Ingalls' inviolate lien rights under the LHWCA to obtain reimbursement from those asbestos manufacturers when she later sought compensation benefits against Ingalls for the subsequent death of her husband. In other words, with the release by Mrs. Yates of her future claims for the wrongful death of her husband, the potential subrogation claims of Ingalls under the LHWCA against the third party asbestos manufacturers for his death were also

extinguished. See, e.g., *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985). Notwithstanding the prejudicial effect of these unapproved settlements on Ingalls, the Fifth Circuit held that Mrs. Yates was not a "person entitled to compensation" under § 33(g) of the LHWCA when she entered into the third party settlements, and therefore, she had no obligation to obtain the consent of Ingalls to the six third party settlements which released her future claims for the wrongful death of her husband. (App. 9-11)

The decision of the Fifth Circuit in this case is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit concerning the same issue. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705, 129 L. Ed. 2d 833 (1994). (App. 91-100) Consequently, because of this split among the Circuits, there are special and important reasons for this Court to grant Ingalls' Petition for a Writ of Certiorari herein.

In reaching their conflicting rulings on the issue of whether a potential widow must comply with § 33(g) of the LHWCA, both the Fifth and Ninth Circuits relied heavily upon this Court's decision in *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L. Ed. 2d 379 (1992). (App. 101-142) In *Cowart*, this Court found that an injured employee became a person entitled to compensation at the time of the injury rather than the later date upon which an employer may admit liability. In reaching its decision, this Court noted that Cowart became a person entitled to compensation "at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." 120 L. Ed. 2d at p.

390. (App. 109) In strictly interpreting the statute to bar the recovery by the claimant in *Cowart* for not obtaining his employer's approval to a third party settlement, this Court noted that its interpretation of the statute comported with the purpose and structure of § 33. *Id.* at 393. (App. 116)

Factually, the *Cowart* decision did not deal with whether a wife can pursue LHWCA death benefits against an employer following the death of her husband after both she and her husband entered into unapproved third party settlements during his life. This exact issue, however, was faced and directly addressed by the Ninth Circuit in the case of *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705, 129 L. Ed. 2d 833 (1994). In *Cretan*, as in the case at bar, an injured shipyard worker and his wife entered into third party settlements prior to his asbestos-related death. Those settlements, like the settlements in the instant claim, included not only the wife's loss of consortium claims but also her potential wrongful death claims. Mr. and Mrs. Cretan, like Mr. and Mrs. Yates in the present case, did not obtain the employer's written consent to the third party settlements. Under those circumstances, the Ninth Circuit held that the wife's subsequent LHWCA claim for death benefits was barred because she entered into the unapproved third party settlements prior to her husband's death. 1 F.3d 843 (9th Cir. 1993)

The Ninth Circuit in *Cretan* also noted that considering a potential widow who prejudices the employer and carrier's subrogation rights as a "person entitled to compensation" when she entered into pre-death third party



settlements with her husband, would effectuate the purpose of both § 33(f) and § 33(g) of the LHWCA. Furthermore, the *Cretan* court cited with approval the Ninth Circuit's earlier decision in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991), which held that the phrase "person entitled to compensation" need not be fixed at any particular moment. (App. 96)

In consideration of the language of § 33 and its purpose of protecting employers against improvident third party settlements by employees, it is submitted that this Court should adopt the reasoning of *Cretan* and reject that of *Yates* in order to resolve the split between the Ninth Circuit and the Fifth Circuit on this issue.

First, the language of § 33(g) of the LHWCA supports the *Cretan* result and provides as follows, to-wit:

(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) *would be* entitled under this Act, the employer shall be liable for compensation as determined under § (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative.) . . .

33 U.S.C. § 933(g) (emphasis added) (App. 89-90)

Thus, by making itself applicable to what the claimant "would be" entitled to under the Act, the statute itself encompasses a forward looking concept which should

apply to the actions of a potential widow. See *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981).

Additionally, the underlying purpose of § 33 is to place liability on the third party entity who ultimately caused the employee's harm, and thereby protect the employer who is subject to absolute liability irrespective of fault under the Act. 33 U.S.C. § 904(b); *Peters v. North River Insurance Co. of Morristown, NJ*, *supra*, 764 F.2d at 310. Because of an employer's absolute liability under the Act, § 33(g) was incorporated into the LHWCA for the express purpose of preventing a claimant from prejudicing the subrogation rights, past and future, of the employer, by accepting too little for his cause of action against a third party. *I.T.O. Corp. of Baltimore v. Selman*, 954 F.2d 239, 242 (4th Cir. 1992); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 467, 88 S.Ct. 1140, 1145, 20 L. Ed. 2d 30, 36 (1968). Consequently, where a potential widow's actions prejudice the rights of the employer and carrier, she should be subject to the same obligations as a widow in order to effectuate the purpose of the statute.

Furthermore, the decision of the Fifth Circuit in this case overlooks the fact that many aspects of a death claim vest at the time of the worker's injury. For example, the responsible employer and/or carrier is determined at the time of injury. *The Travelers Insurance Co. v. Marshall*, 634 F.2d 843 (5th Cir. 1981). Likewise, questions of dependency are determined at the time of injury, as opposed to the time of death. 33 U.S.C. § 909(f). Moreover, Mrs. Yates assumed the status of a widow by releasing her future rights to make a claim for the death of her husband in order to obtain the benefit of the unapproved third party settlements even before her husband's death. Consequently, by gaining the benefits the status conferred, she

should not be allowed to avoid the concomitant burden of being considered to already have a vested claim. *See Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992). Therefore, a potential widow's claim vests at the time of her husband's injury, as opposed to the time of his death. This is so because without her husband's injury, which led to his death, there could be no claim for death benefits, 33 U.S.C. § 909, and no claim for third party tort or wrongful death relief.

The decision of the Fifth Circuit in the present case created a split in the circuits as to whether § 33(g) applies to a potential widow, and results in an interpretation of the statute which is contrary to its language and purpose. Additionally, the Fifth Circuit's decision fails to consider that the claimant assumed the position of a widow before her husband's death in order to collect potential wrongful death benefits in her third party settlements. She should not be able to assume that position when it favors her, but to disregard it when it does not.

Further, by way of analogy, if an employee is injured at work but does not initially miss work due to the injury, he may not be entitled to *receive* compensation. It could hardly be argued, however, that if that employee pursues a third party action for tort benefits due to the injury, he is not "a person *entitled* to compensation" under § 33(g) (emphasis added). The employee's entitlement to compensation, per *Cowart*, accrues when he was injured, regardless of whether the employer has paid or recognized the employee's entitlement to compensation. Likewise, where an employee is injured at work in such a way that the injury may lead to the employee's death, the fact that the spouse of the employee is not yet receiving

compensation while the employee is alive does not mean that she loses her status as a "person *entitled* to compensation" (emphasis added). Surely, a spouse seeking death benefits under the LHWCA should not be granted any greater rights under § 33(g) than the injured and deceased employee would have had, had he lived and consummated unapproved third party settlements.

Considering the split in authority between the Fifth and Ninth Circuits, this Court should grant this Petition and issue a writ of certiorari to the U. S. Court of Appeals for the Fifth Circuit in order to settle this unresolved area of the law.

2. **DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN CONCLUDING, CONTRARY TO THE RULING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *I.T.O. CORP. OF BALTIMORE V. BENEFITS REVIEW BOARD*, 542 F.2d 903 (4th CIR. 1976) (*EN BANC*), *VACATED SUB NOM. ADKINS V. I.T.O. CORP. OF BALTIMORE*, 433 U.S. 904, 97 S.Ct. 2967, 53 L. Ed. 2d 1088 (1977), *REAFFIRMED EN BANC, I.T.O. CORP. OF BALTIMORE V. BENEFITS REVIEW BOARD*, 563 F.2d 646 (4th CIR. 1977), THAT THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, HAS STANDING TO ACTIVELY RESPOND TO THE EMPLOYER AND CARRIER'S APPEAL OF A RULING IN A CASE IN WHICH THE DIRECTOR HAS NO INTEREST?**

Notwithstanding the lack of a financial stake in the outcome of this matter, the able legal representation of claimant in this adversarial proceeding, and the fact that



the outcome of this case has no bearing on the responsibilities conferred on the Director of the Office of Workers' Compensation Programs, U.S. Department of Labor (hereinafter "Director") by the LHWCA, the Director has interjected himself into this claim as an advocate for Mrs. Yates.

Over petitioners' objection, the Fifth Circuit ruled in the instant claim that the Director had standing to appear as a respondent in light of *Ingalls Shipbuilding, Div. Litton Systems, Inc. v. White*, 681 F.2d 275 (1982), reversed on other grounds; *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, cert. denied, 469 U.S. 818 (1984). In *White*, the Fifth Circuit held that the Director had standing to respond even without an economic interest in the outcome of the case, based on Rule 15(a) of the Federal Rules of Appellate Procedure. *White*, cited *supra*, at 282. (App. 143-180)

However, the Fifth Circuit's decision in the instant claim is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903 (4th Cir. 1976) (*en banc*), vacated sub nom. *Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904, 97 S.Ct. 2967, 53 L. Ed. 2d 1088 (1977), reaffirmed *en banc*, *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977). In that case, the Fourth Circuit held that "to be a party [respondent] before this court, the Director must have some concrete stake in the outcome of the case." *Id.*, 542 F.2d at 907. (See App. 181-197)

This Court has recently decided that the Director does not have standing to petition the Court of Appeals

for reversal of a Benefits Review Board decision in which it has no statutorily conferred interest. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. \_\_\_, 115 S.Ct. 1278, 131 L. Ed. 2d 160 (1995). (App. 198-224) However, in a footnote, this Court stated that its opinion in that case, " . . . intimates no view on the party-respondent question." 131 L. Ed. 2d at 168, n.2. There being no statutorily conferred stake of the Director involved here, Rule 15(a) of the Federal Rules of Appellate Procedure should not grant standing where the interests necessary for standing as articulated in *Newport News* are not present.

Consequently, the petitioners herein would assert that the conflict between the Fifth and Fourth Circuits in the instant claim presents this Court with the issue of the Director's standing to actively participate as a respondent, which was left unresolved in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, cited *supra*.

**3. DOES § 33(F) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT ALLOW THE EMPLOYER AND CARRIER TO SET OFF OR REDUCE THEIR LIABILITY FOR DEATH BENEFITS BY AMOUNTS RECEIVED BY THE NON-DEPENDENT HEIRS-AT-LAW FROM THIRD PARTY DEFENDANTS?**

In the instant claim, Mrs. Yates and her adult children have entered into three settlements after the decedent's death on January 28, 1986. These three settlements are in the gross amount of \$105,821.00, and the net amount of \$66,150.00. Pursuant to the decision of the Fifth Circuit, Ingalls is only entitled to one-seventh of the

net amount (the amount received by Mrs. Yates), or \$9,450.00, as its total setoff of liability for death benefits, but is not entitled to any share received by the adult Yates children.

The decision of the Fifth Circuit is a departure from established law regarding the inviolability of the LHWCA lien of the employer and carrier for benefits paid and the high priority of reimbursement under § 33(f) to an employer out of third party recoveries. For example, in *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985), the Fifth Circuit held "that Congress is aware that the courts have recognized a compensation lien on third party recoveries and, indeed, intends for the lien to 'remain[] inviolable, consistent with *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 . . . ." *Peters*, 764 F.2d at 312. (Citation omitted.) That court further recognized that "the right to reimbursement attaches to the proceeds of a judgment . . . or to the proceeds of a compromise agreement. . . ." *Id.* *Peters* went on to state the priority of disbursements from a judgment or settlement, with attorney fees deducted first, the employer's lien second, and any remainder payable to the plaintiff. *Id.* See also *Ochoa v. Employer National Insurance Co.*, 724 F.2d 1171 (5th Cir. 1984), upon rehearing, 754 F.2d 1196, 1198 (5th Cir. 1985).

As noted above, for widows' claims and recoveries, the Fifth Circuit's decision in effect realigns or reorganizes this lien disbursement precedent and narrows the reach of the lien's attachment. Section 33(f) of the LHWCA states that an employer is only to pay compensation to a claimant that exceeds "the net amount recovered against such third persons." 33 U.S.C. § 933(f). For

example, if a claimant recovers from a third party, his attorney first deducts his fees and expenses, then the employer's lien is satisfied, and finally, any remainder goes to the claimant. However, pursuant to the Fifth Circuit's decision, when a widow is involved, her attorney gets his fee and expenses first, then the wrongful death beneficiaries receive their share pursuant to state law, and then the employer's lien attaches to just the widow's share. Changing the scenario in this fashion lets state law preempt federal law and reorganizes lien priorities in contravention of the employer's lien inviolability. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74; 100 S.Ct. 925; 63 L. Ed. 2d 215 (1980), *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985), *Bartholomew v. CNG Producing Co.*, 862 F.2d 555 (5th Cir. 1989).

Under the ruling of the Fifth Circuit in the instant claim, the lien of the employer is not satisfied from the amount "recovered against third persons", or from the "proceeds of judgment . . . or from the proceeds of a compromise agreement", but instead attaches to only the share the widow actually receives, even though her share may be merely a fraction of the amount "recovered against such third parties." Thus, the Fifth Circuit's decision is contrary to the LHWCA and established law.

Furthermore, the decision of the Fifth Circuit is contrary to the language and purpose of the statute. Section 33(f) provides as follows, to-wit:

If the person entitled to compensation institutes proceedings within the period prescribed in § 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the



excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered *against such third persons*. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney fees). (Emphasis added.)

33 U.S.C. § 933(f). (App. 89)

From the statutory context, it is obvious that the net amount is the amount recovered *from* the third person and not the amount recovered and received *by* the claimant (emphasis added). Where the plain language of a statute is unambiguous, judicial inquiry is complete. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990). Furthermore, the plain wording of a statute may not be disregarded under the guise of interpreting it liberally. *Maryland Shipbuilding and Drydock Co. v. Jenkins*, 594 F.2d 404 (4th Cir. 1979). Consequently, consideration of who gets what out of a third party settlement is irrelevant. The key inquiry is how much did the third party defendant pay as a result of the injury or death. Therefore, the Fifth Circuit's allowance of a set off or lien reimbursement only in the amount received by the widow and not the amount received from the third parties is contrary to the language of the statute.

Furthermore, the ruling by the Fifth Circuit is contrary to the purpose of § 33 of the LHWCA, which is to place liability for the injury on the third party who caused the injury and, thereby, make the employer whole by way of subrogation for the amounts the employer had to pay the worker (or in this case, his widow) under the

LHWCA on account of such injury, *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306, 310 (5th Cir. 1985); *Louviere v. Shell Oil Co.*, 509 F.2d 278, 283 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078, 96 S.Ct. 867, 47 L. Ed. 2d 90 (1976); *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 324, 84 S.Ct. 748, 754, 11 L. Ed. 2d 732 (1964); and to prevent double recoveries under the LHWCA. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74; 100 S.Ct. 925; 63 L. Ed. 2d 215 (1980). This is so because the employer is strictly liable irrespective of fault to pay benefits under the LHWCA. 33 U.S.C. § 904(b). The Fifth Circuit's ruling in effect places a widow in a better position than her deceased husband would have been if he had settled without Ingalls' consent. Had he lived, Mr. Yates would have had to reimburse Ingalls for its lien, following the payment of his attorney's fees, out of the recovery from the third parties. He could not claim any reduction in Ingalls' lien by arguing that the recovery is to be split in accordance with the Mississippi Wrongful Death Statute. MISS. CODE ANN. § 11-7-13 (1994 Supp.)

The Fifth Circuit's ruling would work contrary to the recognized purposes of § 33(f). First, the Fifth Circuit's ruling that the employer's subrogation interest should be significantly reduced by not allowing a credit under § 33(f) for recoveries by non-dependent heirs at law effectively leaves the employer with substantial exposure despite substantial payments by the third party defendants. Second, the claimant's arguments would allow double recovery by allowing the widow-claimant to have both the benefit of death benefits under the LHWCA and the benefit of allowing her family to enjoy exempt third party settlements which were unapproved by the

employer. Third, such an interpretation gives widows and non-dependent heirs-at-law greater protection and rights than the deceased employee would have had had he lived, and greater rights than even dependent children have under the LHWCA. 33 U.S.C. §§ 902(14) and 909.

Based upon the foregoing, the decision of the Fifth Circuit is a significant departure from long-standing case law recognizing the priority of the inviolate lien of the employer and carrier under § 33(f). Accordingly, Ingalls respectfully requests that this Court grant certiorari to review the Fifth Circuit's decision, which departs from established principles of law.

**4. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN FAILING TO ADOPT THE ADMINISTRATIVE LAW JUDGE'S DECISION THAT CONTRACTUAL AND LEGALLY ENFORCEABLE BASES EXISTED WHICH ALLOWED THE EMPLOYER AND CARRIER TO SET OFF THEIR LIABILITY TO THE WIDOW UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT IN THE AMOUNT OF THE THIRD PARTY RECOVERIES RECEIVED BY BOTH THE WIDOW AND NON-DEPENDENT HEIRS-AT-LAW?**

In the instant claim, the facts indicate that Mrs. Yates and her adult children entered into settlements wherein they executed third party releases which gave Ingalls a setoff for any compensation benefits due by the total net amount received by all of them.

After discussing the conflicting language of the releases, the Administrative Law Judge ruled as follows:

Thus, with respect to all three post-death settlements entered into by claimant and the surviving children of the decedent, it is found that claimant is contractually obligated to give employer a credit for the entire amount of the net proceeds, and not only the one-seventh she received . . . this contractual obligation is recognized in view of the holding in *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987).

(App. 86)

In a decision with three separate opinions, the majority of the Benefits Review Board reversed the Administrative Law Judge's finding of a contractual basis for allowing the employer a credit for all net third party recoveries, since it found that Ingalls was not a party to the releases. In its decision, the Fifth Circuit affirmed the Benefits Review Board for an entirely different reason, *i.e.*, it did not feel that the releases "clearly and unambiguously" required Mrs. Yates to give Ingalls a credit in excess of the sums she received. In reaching its conclusion, the Fifth Circuit erroneously substituted its interpretation of the language of the releases for that of the Administrative Law Judge. Although interpretation of an unambiguous contract is a matter of law, the interpretation of an ambiguous contract is a matter of fact. *Southern Natural Gas Co. v. Pursue Energy*, 781 F.2d 1079 (5th Cir. 1986); *Re Nevets C.M., Inc. v. Nissho Iwai American Corporation*, 726 F.Supp. 525 (D.N.J. 1989). Where there is an ambiguity in the contract, the fact-finder's interpretation



of the conflicting evidence is entitled to deference. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1212, 131 L. Ed. 2d 76 (1995). Likewise, under the LHWCA, long-standing case law requires that the Administrative Law Judge's interpretation of conflicting evidence be given deference. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 189 (5th Cir. 1992); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1006 (5th Cir. 1978); *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 59 S.Ct. 501, 504-505, 83 L. Ed. 660 (1939). In reviewing a matter on appeal, it is immaterial that the facts permit the drawing of different inferences or that the appellate court would have reached a different conclusion on the same facts. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1942); *Symanowicz v. Army & Air Force Exchange Service*, 672 F.2d 638 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 376, 459 U.S. 1016, 74 L. Ed. 2d 510 (1982).

Furthermore, the Benefits Review Board and the Fifth Circuit overlooked the order entered by the United States District Court for the Southern District of Mississippi which approved the Wellington settlement. That order has been disregarded and given absolutely no force and effect.

In essence the Fifth Circuit abandoned its appellate function in order to re-weigh the evidence. This the Fifth Circuit should not have done. As such, this Court should grant certiorari to review the Fifth Circuit's authority to substitute its judgment for that of the Administrative Law Judge.

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## CONCLUSION

Because of the conflict between the Fifth Circuit and the Ninth Circuit as to the proper interpretation of § 33(g) of the LHWCA; the conflict between the Fifth Circuit and the Fourth Circuit as to the Director's standing as a respondent; the Fifth Circuit's departure from long-standing case law interpreting § 33(f) and employer's inviolate lien rights; and the Fifth Circuit's erroneous interpretations of the releases and court order, the petitioners herein respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: December 29, 1995

App. 1

**INGALLS SHIPBUILDING, INC., et al., Petitioners,**

**v.**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and Maggie Yates (Widow of Jefferson Yates), Respondents.**

**No. 94-40716.**

**United States Court of Appeals,  
Fifth Circuit.**

**Oct. 3, 1995.**

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Richard P. Salloum, Paul B. Howell, Franke, Rainey & Salloum, Gulfport, MS, for petitioners.

Mark A. Reinhalter, Carol DeDeo, Associate Solicitor of Labor, U.S. Dept. of Labor, Washington, DC, for Director, Office of Workers' Compensation Programs.

Wynn E. Clark, Gulfport, MS, Ransom P. Jones, III, Pascagoula, MS, for Yates.

Paul E. Trayers, Clerk, Benefits Review Bd., Washington, DC, for other interested parties.

Petition for Review of a Final Order of the Benefits Review Board.

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Ingalls Shipbuilding (Ingalls) appeals the order of the Benefits Review Board (BRB) awarding Maggie Yates

death benefits under section 9 of the Longshore and Harbor Workers Compensation Act (the "Act"), 33 U.S.C. § 909. We affirm.

## I.

Jefferson Yates worked periodically as a shipfitter for Ingalls in Pascagoula, Mississippi, from 1953 until 1967, during which time he was exposed to asbestos. He worked in unrelated non-maritime employment from 1967 to 1974, when he voluntarily retired at age 67. In March 1981, he was evaluated for asbestos-related diseases and was later diagnosed as suffering from asbestosis, chronic bronchitis, and possible malignancy of the lungs. In April 1981, Mr. Yates filed a claim for disability benefits under section 8 of the Act. 33 U.S.C. § 908. In May 1981, he filed a third-party lawsuit in a Mississippi federal district court, seeking damages from twenty-three manufacturers and sellers of asbestos products to which he was exposed while employed at Ingalls.

In June 1982, Ingalls admitted the compensability of Jefferson Yates's claim for disability benefits under the Act and tendered benefits. In May 1983, Ingalls and Jefferson Yates executed a settlement agreement pursuant to 33 U.S.C. § 908(i) under which Ingalls agreed to pay Mr. Yates a lump sum payment of \$15,000, give him open medical benefits, and pay his attorney's fees. Ingalls made payment consistent with a May 10, 1983 order of the deputy commissioner. Between May 1981 and January 1984, Jefferson Yates consummated settlement agreements with eight defendants in the federal court suit (the

pre-death settlements). Ingalls was not a party to the pre-death settlements, and Jefferson Yates did not obtain its approval before he made these settlements. Although Maggie Yates was not named a party plaintiff in the federal court suit, she signed releases in each of the pre-death settlements. Although some of the earlier settlements limited Maggie Yates's release to loss of consortium, other settlements foreclosed her from bringing any future tort claim for her husband's wrongful death.

On January 28, 1986, Jefferson Yates died from prostate cancer. The parties stipulated that his asbestosis contributed to his death. In addition to his wife, Jefferson Yates was survived by six non-dependent children. In April 1986, Maggie Yates filed a claim for death benefits under section 9 of the Act against Ingalls and its carrier.<sup>1</sup> Ingalls promptly controverted Mrs. Yates's claim.

Maggie Yates and her six non-dependent children continued Jefferson Yates's federal court suit, which was converted from a personal injury action to a wrongful death action. Thereafter, Maggie Yates and her six children entered into settlements with Raymark, et al. on June 9, 1987, for \$2,821; with Wellington, et al. on April 5, 1989, for \$60,000; and with Johns-Manville, et al. on March 3, 1989, for \$43,000 (the post-death settlements). In accordance with section 33(g)(1), Mrs. Yates obtained Ingalls's written approval for the three post-death settlements.

<sup>1</sup> None of the six children filed claims for death benefits under the Act.



Ingalls defended Ms. Yates' claim for death benefits under the Act on two fronts. It argued that Mrs. Yates' pre-death settlement with the asbestos defendants was without its approval and her claim for post-death benefits was therefore barred by § 33(g)(1) of the Act as interpreted by the Supreme Court in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992).

Ingalls also argued that once it took credit for all the net proceeds of the post-death settlements against its potential liability to Maggie Yates for death benefits under the Act, it was mathematically impossible that it would be required to pay death benefits to Mrs. Yates.

In an April 1992 decision and order, the Administrative Law Judge (ALJ) held that, at the time of the pre-death settlements, Maggie Yates was not a person "entitled to compensation" under section 33(g)(1) and was therefore exempt from that subsection's written approval requirement. Thus, the ALJ concluded that Maggie Yates's claim for death benefits under the Act was not barred by section 33(g)(1).

Based on the Mississippi wrongful death statute and Maggie Yates's own testimony, the ALJ determined that the post-death settlements were apportioned between Maggie Yates and the six children, so that Maggie Yates only received one-seventh of the net amount. The ALJ concluded that Ingalls was only entitled to a credit for one-seventh of the post-death settlement under the Act. However, the ALJ held that, based on the terms of the post-death settlement agreements, Ingalls was contractually entitled to receive credit under section 33(f) for the

entire net amount of the post-death settlements to offset its statutory liability for death benefits. Accordingly, the ALJ awarded Maggie Yates death benefits under section 9 of the Act and held that Ingalls was entitled to a credit under section 33(f) for the entire net amount of the post-death settlements.

Maggie Yates appealed the ALJ's decision to the BRB, and Ingalls cross-appealed. The Director of the Office of Workers' Compensation Programs (Director) responded to the appeals and supported Maggie Yates's interpretations of both section 33(g)(1) and 33(f). In a June 1994 decision, the BRB affirmed the ALJ's holding that Maggie Yates's claim for death benefits was not barred by section 33(g)(1) because she was not "a person entitled to compensation" at the time of the pre-death settlements. The BRB also affirmed the ALJ's order declining to give a credit as a matter of law for settlement sums received by the Yates non-dependent children against death benefits Ingalls owed under the Act. A majority of the BRB held that no contractual basis existed for allowing the offset of the entire net amount received in the post-death settlements and reversed the ALJ on this point. One member of the three judge panel dissented, arguing that, under the terms of the post-death settlements, Maggie Yates waived her right to apportionment.

Ingalls filed a timely petition for review with this Court. The Director appeared as a respondent and filed a brief supporting Maggie Yates's interpretations of sections 33(g)(1) and 33(f). We consider below the issues presented in this appeal.

## II.

## A.

Ingalls argues first that § 33(g)(1) of the Act bars Mrs. Yates' claim for death benefits because she entered into third party settlements without Ingalls' approval before Mr. Yates' death.<sup>2</sup> This court's review of BRB decisions is limited to considering errors of law and ensuring that the BRB adhered to its statutory standard of review, namely,

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<sup>2</sup> Ingalls moved to strike the brief of the Director and disallow any further participation, asserting that the Director lacked standing. In *Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 281-84 (5th Cir.1982), *overruled on other grounds*, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406-07 (5th Cir.) (en banc), *cert. denied*, 469 U.S. 818, 105 S.Ct. 88, 83 L.Ed.2d 35 (1984), this Court held that the Director has standing to participate as a respondent in the appeal of a BRB decision. In so holding, the court in *White* rejected the line of cases relied on by Ingalls in this appeal, namely, the Fourth Circuit's rule that the Director must show a stake in the outcome of the controversy in order to respond to a petition for review under 33 U.S.C. § 921(c). *White*, 681 F.2d at 281. In *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1278, 131 L.Ed.2d 160 (1995), the Supreme Court held that the Director had no standing to petition the court of appeals seeking reversal of a BRB decision. *Id.* at \_\_\_, 115 S.Ct. at 1288. The Court in *Newport News Shipbuilding* differentiated an agency's entitlement to party-respondent status from its standing to appeal and commented that the decision "intimates no view on the party-respondent question." *Id.* at \_\_\_ n. 2, 115 S.Ct. at 1284 n. 2. Thus, *White* remains binding precedent in this Circuit and forecloses Ingalls's argument that the Director has no standing to respond in this case.

whether the ALJ's factual findings are supported by substantial evidence. *Tanner v. Ingalls Shipbuilding*, 2 F.3d 143, 144 (5th Cir.1993).

Section 33(g)(1) provides,

"If the person entitled to compensation (or the person's representative) enters into a settlement with a third person [other than an employer or person in his employ] for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or by the person's representative.)" 33 U.S.C. § 933(g)(1).

Section 33(f) governs third-party recovery by persons entitled to compensation. If a person entitled to compensation enters into an unapproved third-party settlement for an amount less than he is entitled to under the Act, all rights to compensation under the Act are terminated pursuant to section 33(g)(1). On the other hand, if the person entitled to compensation enters a third-party settlement for an amount greater than his statutory entitlement, then the written approval requirement of section 33(g)(1) does not apply, and the employer would be entitled to a 100% set-off under section 33(f).

Mrs. Yates concedes that the pre-death settlements were not approved in writing by Ingalls but argues that when these settlements were made, Mr. Yates was the only "person entitled to compensation" and thus she was



not a "person entitled to compensation." She argues that because she had no right to compensation she was not required to obtain Ingalls's written approval for the pre-death settlements. On the other hand, Ingalls argues that Maggie Yates, as a potential widow, qualifies as "a person entitled to compensation" and that her failure to obtain written approval of the pre-death settlements in accordance with section 33(g) bars her claim for death benefits. Both the ALJ and the BRB agreed with Maggie Yates's interpretation of the phrase "a person entitled to compensation." The parties focus their arguments on *Estate of Cowart*, 505 U.S. 469, 112 S.Ct. 2589, a recent Supreme Court decision interpreting this phrase in section 33(g)(1).

In *Cowart*, the employee suffered a work-related hand injury, and his employer paid temporary total disability benefits for ten months but refused to pay permanent partial disability. During the period when he was not receiving any benefits, *Cowart* settled a third-party action without obtaining the written approval of his employer. *Cowart* argued that he was not "a person entitled to compensation" under section 33(g)(1) at the time of the settlement because his employer was not voluntarily paying benefits and a formal award of benefits had not been issued. Because he was not "a person entitled to compensation," *Cowart* contended that he was not required to obtain his employer's approval of the settlement pursuant to § 33(g)(1).

Rejecting *Cowart's* argument, the Supreme Court held that he became "a person entitled to compensation" at the time of the work-related injury and that it was immaterial whether the employee was receiving benefits at the time of the third-party settlement. *Id.* at 476-77, 112 S.Ct. at

2594-95. The Court stated, "*Cowart* suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. *He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event yet to happen.*" *Id.* at 477, 112 S.Ct. at 2595 (emphasis added).

Both Maggie Yates and the Director argue that, under *Cowart*, Maggie Yates was not "a person entitled to compensation" at the time of the pre-death settlements because her right to recover death benefits did not vest until her husband's death. See *Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 846 (5th Cir.1981) (stating that "a cause of action for death benefits certainly does not arise until death").

In response, Ingalls asserts that this panel should follow the Ninth Circuit's interpretation of "a person entitled to compensation" in a case very similar to the instant case. In *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir.1993), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705, 129 L.Ed.2d 833 (1994), an employee exposed to asbestos during his employment filed a claim for disability benefits under the Act, and the employer disputed liability. The employee also filed a product liability suit against numerous asbestos manufacturers and entered into settlement agreements with several of those manufacturers without obtaining the written approval of his employer. Although his wife and daughter were not named as parties in the third-party suit, both settled their wrongful death claims against the manufacturers as part of the settlement agreements. In addition, his wife settled her loss of consortium claim in the same series of agreements.



After the employee died, an ALJ awarded disability benefits to his wife and death benefits to his wife and daughter. The Ninth Circuit held that the wife and daughter were "persons entitled to compensation" and therefore could not recover death benefits under the Act because they failed to obtain the written approval of the employer for the pre-death settlements as required by section 33(g). *Id.* at 848.

The *Cretan* court considered the Supreme Court's language in *Cowart* that the employee "became a person entitled to compensation at the moment his right to recovery vested," and concluded that it was dicta that was not binding on the court. The precise issue presented in *Cowart* was the definition of "a person entitled to compensation." The Court's determination that the employee qualified under this statutory test when his right to recovery vested is the core of the Supreme Court's holding. We therefore disagree with the *Cretan* court's conclusion that this critical part of the Supreme Court's opinion in *Cowart* is dicta.

Thus, applying *Cowart*'s definition we conclude that section 33(g)(1) does not bar Maggie Yates's death benefits claim because she was not "a person entitled to compensation" at the time of the pre-death settlements. At the time of the pre-death settlements, Maggie Yates's claim for death benefits had not vested. Three contingencies come to mind under which Maggie Yates's right to death benefits under the Act would have never accrued. She could have predeceased or divorced her husband, or Jefferson Yates could have died from causes unrelated to his employment. Under any of these scenarios, Maggie Yates's right to death benefits under the Act would never

have accrued. Because Mrs. Yates' right to death benefits had not vested when the pre-death settlements were made, her failure to obtain Ingalls's written approval of the pre-death settlements is irrelevant.

#### B.

Ingalls argues next that the BRB erred in concluding that Ingalls was not entitled to offset from death benefits due Ms. Yates the entire amount of the *post-death* settlements. The ALJ determined that Maggie Yates only received one-seventh of the net amount of the three *post-death* settlements. He held, however, that, as a matter of contract law, the settlement agreements Ms. Yates executed permitted Ingalls to offset the entire net amount of the *post-death* settlements. The BRB reversed and held that Ingalls was only entitled to set-off the net amount received by Maggie Yates.

We first consider the propriety of the BRB's offset under § 33(f) of the Act, without regard to the provisions of the settlement agreement. Section 33(f) provides:

"If the person entitled to compensation institutes proceedings . . . the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the *net amount recovered against such third party*. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees). 33 U.S.C. § 933(f) (emphasis added).

Ingalls first argues that, as a matter of law, it is entitled to a credit under section 33(f) for the net amount of all the post-death settlements. Ingalls argues that the appropriate set-off is the "amount recovered against the third party." Respondents counter that the proper offset is the net amount recovered by "such person" entitled to compensation. Several courts have addressed this precise issue. In *Force v. Director*, an employee's widow and her two children settled their potential wrongful death action with third-parties. 938 F.2d 981 (9th Cir.1991). In the widow's later claim for death benefits under the Act, the employer argued that it was entitled to a credit for the net amount the widow and her two children obtained in the settlement agreements. Like the Yates children, the Force children filed no claims for death benefits under the Act. Rejecting the employer's argument, the Ninth Circuit stated,

"The offset provision [of section 33(f)] applies to the third party recovery obtained by "the person entitled to compensation" under the Act. An employer is entitled to offset its liability to a particular claimant only the third party damages received by the claimant for the covered occupational injury or death . . . The Force children did not file claims for LHWCA benefits and are not entitled to them; section 933(f) simply does not apply to the children or their third party recovery." *Id.* at 985 (emphasis added).<sup>3</sup>

<sup>3</sup> The settlement at issue in *Force* was executed before the employee died. Because the court in *Force* also held that a potential widow was a "person entitled to compensation" under section 33(f), it applied section 33(f) to the pre-death settlement. Although Ingalls argues that we should adopt *Force's* definition

The Fourth Circuit has also adopted this interpretation of section 33(f) in determining apportionment among parties. See *I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971 (4th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1579, 123 L.Ed.2d 147 (1993) ("Employer's offset rights [under section 33(g)] are limited to the portion intended for the claimant since the claimant is the 'person entitled to compensation.' "). See also *Brown v. Forest Oil Corp.*, 29 F.3d 966, 972 (5th Cir.1994) (in the context of an employer's lien, "[e]mployer's offset rights are limited to the portion of the recovery intended for the employee").

Based on the plain language of § 33(f) and the above authorities, we conclude that Ingalls's argument that it is entitled as a matter of law to a credit for the net amount received by Mrs. Yates and her six children from the post-death settlements must be rejected. Ingalls is only entitled to a credit under section 33(f) for the net amount received by Mrs. Yates.

Relying on *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir.1987), Ingalls argues next that the provisions of the post-death settlement agreements provide them with an independent basis to obtain credit for the net amount of the settlements received by Maggie Yates and her six children. The respondents counter that the terms of the settlement agreement are ambiguous and cannot be reasonably interpreted as a consent by Maggie Yates to grant Ingalls a credit for the net amount of all third party recoveries. In addition, the respondents assert that the

of "a person entitled to compensation" for section 33(g), it does not argue that it is entitled to a set-off under section 33(f) for the pre-death settlements.



BRB properly held that Ingalls had no right to enforce the terms of the settlement agreements.

Because we are persuaded that the respondents' first argument is meritorious, we do not reach their remaining contentions. For the reasons explained below, we conclude that the language in these contracts does not clearly and unambiguously require Mrs. Yates to give Ingalls a credit for any sums that exceed the net amount she received from the settlements.

Three separate settlements were reached in this case and three separate releases were executed. The settlement with Raymark Industries et al. was signed on June 9, 1987. Mrs. Yates and her six children are named in the body of the release and referred to collectively as "Releasors." The critical paragraph provides in part that if any claim for worker's compensation benefits . . . [1] "shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to any Releasor shall first be given credit for the consideration paid to Releasors under this agreement, less reasonable costs of collection, and [2] shall make no payment of any compensation benefits to any Releasor until the consideration paid to Releasors under this agreement is exhausted." The initial clause quoted above reflects an intent to give the employer a credit to the extent any compensation payments to the Releasors constitute "a lien against the consideration paid herein." Obviously the only portion of the third party settlement which could be subject to a lien are for sums paid to a person "entitled to compensation." No compensation lien

can be imposed on settlement sums paid by a third party to an employee not entitled to compensation. See 33 U.S.C. § 917. Thus, the language in the release which purports to give the employer a set-off against settlement sums subject to a compensation lien reflects an intent to limit the set-off to the portion of the settlement paid to a party entitled to compensation.

This supports the director and Mrs. Yates' argument that the language of the instrument does not reflect an intent to grant a set-off for the total amount of the settlement. The second clause in the above quoted provision ("and shall make no payment of any compensation benefits to any Releasor until the consideration paid to Releasors under this agreement is exhausted") could, if read in isolation, reflect an intent to grant the employer a credit for the total consideration paid to all Releasors under the settlement agreement. But the second clause does not clearly indicate an intent to grant a credit for sums not covered by a compensation lien. The second clause can reasonably be read to grant a credit to the employer against sums paid to all "Releasors" for all settlement sums subject to a compensation lien.<sup>4</sup> The

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<sup>4</sup> In the *Raymark* settlement, the third party tort defendants obtained an individual "acknowledgement" from Maggie Yates giving Litton systems "credit for the amount of money paid to me by the above named defendant." It stated further that "Litton Systems will owe me no workmen's compensation benefits or medical benefits under the Longshore & Harbor Workers' Compensation Act until the amount received by me from the above mentioned defendant has been exhausted based on the weekly benefits due me from Litton Systems, Inc. . . ." This instrument, prepared for Mrs. Yates' signature, makes no reference to Mrs. Yates' children; and Mrs. Yates' children signed no separate

settlement instrument does not evidence an intent to grant Ingalls a set-off in derogation of § 33(f) of the Act with sufficient clarity to permit enforcement.

Language almost identical to that quoted above in the Raymark release is included in the other two instruments. In the Wellington settlement, the release provides that if any claim for workmen's compensation shall be filed and be successful . . . "and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to either of the undersigned shall first be given credit for the consideration paid to the undersigned under this agreement. . . . " The Manville settlement contains an almost identical provision.<sup>5</sup>

For the reasons stated above, we conclude that the language in these three instruments do not reflect with sufficient clarity an intent to grant Ingalls a credit against any larger portion of the settlement sum than would be subject to a compensation lien. A compensation lien would only be imposed on the settlement sums received by Mrs. Yates since she was the only settling party who was entitled to compensation.<sup>6</sup>

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acknowledgement similar to the one signed by Mrs. Yates. (emphasis added) See page 17 of RX 21.

<sup>5</sup> Neither the Wellington nor the Manville settlement papers include a separate document similar to the "Acknowledgement" signed by Mrs. Yates in the Raymark settlement and discussed in note 4.

<sup>6</sup> Although Mrs. Yates was not entitled to compensation at the time of the pre-death settlements, her right to compensation under the Act accrued upon Mr. Yates' death. See 33 U.S.C. § 909.

For the reasons stated above, we affirm the order of the BRB.

AFFIRMED.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40716

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INGALLS SHIPBUILDING, INC., and  
AMERICAN MUTUAL LIABILITY INSURANCE  
COMPANY, in liquidation, by and  
through THE MISSISSIPPI INSURANCE  
GUARANTY ASSOCIATION,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS'S COMPENSATION  
PROGRAMS, U.S. DEPARTMENT OF LABOR and  
MAGGIE YATES (widow of Jefferson Yates),

Respondents.

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On Petition for Review of An Order of the  
Benefits Review Board

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/20/95, 5 Cir., \_\_, \_\_ F.3d \_\_)

(November 22, 1995)

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as a  
Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor Judge  
in regular active service of the Court having requested  
that the Court be polled on rehearing en banc (FRAP and  
Local Rule 35), the Suggestion for Rehearing En Banc is  
DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a  
Petition for Panel Rehearing, the Petition for Panel  
Rehearing is DENIED. The Court having been polled at  
the request of one of the members of the court and a  
majority of the Judges who are in regular active service  
not having voted in favor (FRAP and Local Rule 35), the  
suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis  
W. EUGENE DAVIS  
United States Circuit Judge

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BRB Nos. 92-2322  
and 92-2322A

MAGGIE YATES )  
(Widow of JEFFERSON YATES) )  
Claimant-Petitioner )  
Cross-Respondent )  
v. )  
INGALLS SHIPBUILDING, )  
INCORPORATED )  
Self-Insured )  
Employer-Respondent )  
Cross-Petitioner )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT OF )  
LABOR )  
Respondent )

DATE ISSUED:  
JUN 29 1994

DECISION and  
ORDER

### SYLLABUS

#### Digest Section

- 3706 The Board found that a potential widow is not a "person entitled to compensation" under Section 33(g)(1) prior to the death of her spouse, and thus the subsection does not act as a bar to the widow's subsequent death benefits claim where the widow and decedent settled third-party claims without written approval prior to his death.
- 3704 Where the settlement amounts were apportioned among claimant and her six non-dependent adult children consistent with Mississippi law, the Board found that the ALJ erred in finding employer to be

entitled to an offset for the total net proceeds of claimant's post-death settlements. Therefore, the Board vacated the ALJ's finding that employer is entitled to a credit of the total proceeds of the post-death settlements, and held that employer is entitled to offset only the amount claimant received in the post-death settlements, not the amounts received by decedents' other heirs. Accordingly, the Board modified the ALJ's decision to reflect that employer is entitled to offset only claimant's one-seventh share of the post-death settlements against its compensation liability.

Appeals of the Decision and Order – Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Steven J. Miller (Ransom P. Jones, III, P.A.), Pascagoula, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C. for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant, the widow of Jefferson Yates (decedent), appeals, and employer cross-appeals, the Decision and Order – Awarding Benefits (91-LHC-324) of Administrative Law Judge Quentin P. McColgin rendered on a claim filed pursuant to the provisions of the Longshore and



Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board held oral argument in this case in Mobile, Alabama, on January 11, 1994.

Decedent worked for employer as a shipfitter for various periods between 1953 and 1967, during which time he was exposed to asbestos. Decedent voluntarily retired from his subsequent non-maritime employment in 1974. In March 1981, decedent was diagnosed as suffering from asbestosis, chronic bronchitis, and possible malignancy of the lungs. On April 16, 1981, decedent filed a claim for benefits under the Act. On May 26, 1981, he filed a third-party lawsuit in federal court against 23 manufacturers of asbestos products.

Prior to the adjudication of his longshore claim, decedent entered into settlement agreements with several of the third-party defendants. While claimant was not a named party plaintiff in the third-party action undertaken by decedent, she did sign each of these pre-death settlements as a co-releasor with regard to her loss of consortium. On June 8, 1982, employer admitted the compensability of decedent's claim under the Act and tendered benefits. Subsequently, on May 5, 1983, a Section 8(i), 33 U.S.C. §908(i) (1982), settlement was executed by the parties, awarding decedent a lump sum of \$15,000, open medical benefits and attorney's fees. Payment was made pursuant to an order of the deputy commissioner dated May 10, 1983. Following this order, decedent

entered into additional third-party settlements which were also co-signed by claimant; in at least two of these settlements, claimant signed as a co-releasor with regard to potential wrongful death actions, in addition to her loss of consortium. With regard to these third-party settlements entered into by decedent and claimant prior to his death (the pre-death settlements), written approval by employer was not obtained.

Decedent died on January 28, 1986, due to prostate cancer.<sup>1</sup> On April 22, 1986, claimant filed a claim for death benefits under the Act; employer filed its notice of controversion on May 21, 1986. Claimant and decedent's six non-dependent, adult children continued decedent's federal court action, which converted from a personal injury action to a wrongful death action. Thereafter, claimant and decedent's children entered into settlements with the following three third-party defendants (the post-death settlements):

<u>Defendant</u>	<u>Date</u>	<u>Gross</u>	<u>Net</u>
Raymark	May 10, 1988	\$2,821	\$1,880.67
Wellington	April 5, 1989	\$60,000	\$36,000
Johns-Manville	June 19, 1989	\$43,000	\$25,800

Unlike the pre-death settlements, written approval from employer of the post-death settlements was obtained.

After concluding that it could credit against its potential compensation liability all the net proceeds from these settlements, and in light of claimant's age, 83,

<sup>1</sup> The parties stipulated that decedent's asbestosis contributed to his death. *See* Jt. Ex. 1.

employer thereafter filed a motion to amend its "answer," admitting compensability of claimant's death benefits claim, but seeking a dismissal of the claim on the basis that it was a mathematical impossibility that it would ever have to pay claimant benefits. In response, claimant asserted that only her share, one-seventh of the net proceeds from the settlements, should be credited against employer's compensation liability under the Act.

In his Decision and Order Awarding Benefits, the administrative law judge, noting that claimant's claim for death benefits is separate and distinct from decedent's claim for disability benefits, found that at the time of the pre-death settlements, claimant was not "a person entitled to compensation" under Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), and was thereby exempt from that subsection's requirement that written approval of the third-party settlements be obtained from employer. Accordingly, the administrative law judge found that claimant's claim for death benefits under the Act was not barred pursuant to Section 33(g)(1). Furthermore, the administrative law judge found that claimant provided employer with notice of the pre-death settlements, as required by Section 33(g)(2) of the Act, 33 U.S.C. §933(g)(2). Next, the administrative law judge found that by operation of the Mississippi wrongful death statute, as well as claimant's own testimony, the proceeds of the post-death settlements were apportioned among claimant and decedent's six non-dependent children, such that claimant received only one-seventh of the net amount of those three settlements. However, the administrative law judge found that based on the terms of these post-death

settlement agreements, employer was contractually entitled to receive a credit under Section 33(f) of the Act, 33 U.S.C. §933(f), for the entire amount of the net proceeds of these settlements, not only the one-seventh claimant received, to offset employer's liability for claimant's death benefits.<sup>2</sup> Accordingly, the administrative law judge awarded claimant death benefits, commencing January 28, 1986, pursuant to Section 9 of the Act, 33 U.S.C. §909, and found employer to be entitled to a credit, pursuant to Section 33(f), for the net amount of the post-death settlements entered into by claimant.

On appeal, claimant contends that the administrative law judge erred in finding that employer was entitled to offset its liability for claimant's death benefits by the entire net proceeds of the third-party settlements into which she entered subsequent to decedent's death. Specifically, claimant asserts that the administrative law judge misinterpreted the language of the three post-death settlements, since claimant could not contractually obligate herself to give employer a credit for those shares of the net proceeds which, under Mississippi law, were not her property but the property of her children. Employer

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<sup>2</sup> The administrative law judge also found that claimant's attorney's fee for the third-party settlements, which was based on a 40 percent contingency fee contract, is reasonable. As such, the administrative law judge found that the fee shall be deducted as an expense in determining the net amount of claimant's third-party recovery under Section 33(f) of the Act. In an Order dated June 23, 1992, the administrative law judge denied employer's motion for reconsideration regarding this issue. The administrative law judge's findings in this regard are not challenged on appeal.



responds, urging affirmance. In a reply brief, claimant asserts that it was not the intent of decedent's non-dependent heirs to give employer a credit for the settlement shares they received, and that since those heirs never filed claims under the Act for benefits, they are not subject to the Act's jurisdiction.

In its cross-appeal, employer first contends that, pursuant to the holding of the United States Supreme Court in *Cowart v. Nicklos Drilling Co.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), claimant is "a person entitled to compensation" under Section 33(g)(1), and therefore was required to obtain employer's written approval of the pre-death settlements. Thus, employer avers that since claimant joined in decedent's third-party settlements, which employer did not approve, the administrative law judge erred in not finding that her subsequent claim for death benefits was barred pursuant to Section 33(g)(1).<sup>3</sup> In addition to its appeal of the administrative law judge's finding with regard to Section 33(g)(1), employer, as a protective measure, contends that the administrative law judge should have awarded employer an offset for the net amount received by all third-party plaintiffs pursuant to Section 33(f), notwithstanding the language contained in the settlements themselves. Specifically, employer argues, *inter alia*, that under Section 33(f), the amount employer is entitled to offset

<sup>3</sup> Before he settled his claim under the Act, decedent entered into settlements on May 13, 1981, March 29, 1982, and May 20, 1982. After the settlement order of May 10, 1983, decedent settled third-party claims on May 21, 1983, January 11, 1984, January 30, 1984, and January 31, 1984.

against its liability is the net amount "recovered against such third person," not the amount necessarily recovered by claimant individually. Claimant responds, again urging affirmance of the administrative law judge's finding that her claim for death benefits is not barred by Section 33(g)(1) and reversal of his finding that employer was entitled to offset the total net proceeds of the post-death settlements against its liability under the Act. In reply, employer lastly contends that the holding of the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir.1993), *aff'g in part and rev'g in part* 24 BRBS 35 (1990), is dispositive of both the Section 33(g)(1) and 33(f) issues in the instant case.

The Director, Office of Workers' Compensation Programs (the Director), has responded to the appeals in this case, supporting claimant's contentions with regard to both Section 33(g)(1) and Section 33(f). Specifically, the Director contends that the United States Court of Appeals for the Ninth Circuit in *Cretan* misinterpreted the Supreme Court's decision in *Cowart* holding that a person becomes "entitled to compensation" at the moment his right to recovery vests. Since claimant's right to recovery did not vest until her husband died, the Director argues, she was not a "person entitled to compensation" at the time of the pre-death settlements, and thus, Section 33(g) does not bar her claim for death benefits. Moreover, the Director asserts that under Section 33(f), apportionment of a third-party recovery is *mandatory* since that subsection allows the employer to offset only that portion of a settlement attributable to the "person[s] entitled to compensation." The Director asserts that claimant's children

were not "persons entitled to compensation" since they did not file claims under the Act. The Director also agrees with claimant that the administrative law judge misinterpreted the language of the post-death settlements; in the alternative, the Director argues that even if the administrative law judge was correct in finding that employer was contractually entitled to receive a credit for the post-death settlement proceeds attributable to claimant's children, Section 15(b) of the Act, 33 U.S.C. §915(b), prohibits such a result.

#### I. Section 33(g)(1)

The first issue presented by the appeals in this case is whether the administrative law judge properly determined that claimant's claim for death benefits under the Act was not barred by Section 33(g)(1) of the Act. We hold that the administrative law judge correctly concluded that Section 33(g)(1) did not bar claimant from pursuing her claim for death benefits.

Section 33(g)(1), as amended in 1984, states:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement

is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1) (1988). Claimant concedes that the settlements entered into prior to decedent's death were not approved in writing by employer.<sup>4</sup> The administrative law judge found that claimant, as a potential widow, was not a "person entitled to compensation" at the time that the pre-death settlements were executed.<sup>5</sup> Moreover, the administrative law judge found that claimant's death benefits claim is separate and distinct from decedent's claim for benefits, and that her right to file a claim for death benefits did not arise until decedent's death. Thus, the administrative law judge found that claimant was under no obligation to obtain employer's written approval of the pre-death settlements, even though she acted as a co-releaser in signing them, and that Section 33(g)(1) does not act as a bar to her claim for death benefits.

<sup>4</sup> As noted previously, employer approved the three post-death settlements. See Emp. Ex. 22.

<sup>5</sup> At the time the administrative law judge's Decision and Order was issued, the Supreme Court had not yet affirmed the Fifth Circuit's decision in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir.1991) (*en banc*). The administrative law judge found that the Fifth Circuit's interpretation of Section 33(g)(1) was inapplicable to the instant case since it did not concern the issue of potential widows.



Our consideration of employer's contentions on appeal must begin with a discussion of *Cowart v. Nicklos Drilling Co.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), wherein the United States Supreme Court held that under the plain language of Section 33(g)(1), an injured employee forfeits his right to compensation benefits under the Act by failing to obtain the employer's written approval of a third-party settlement for an amount less than the compensation due under the Act. In *Cowart*, the claimant suffered a work-related injury and the employer paid temporary total disability benefits for ten months but refused to pay permanent partial disability benefits. During the period when he was not receiving benefits, the claimant settled a third-party action, but did not secure the employer's written approval of the settlement. The claimant argued that since the employer was not voluntarily paying benefits at the time of the settlement and a formal award of benefits had not been issued, he was not a "person entitled to compensation" under Section 33(g)(1). Thus, the claimant argued, compliance with Section 33(g)(1) was not required.

The Board agreed with the claimant's argument. See *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989). However, the United States Court of Appeals for the Fifth Circuit reversed, holding that Section 33(g) contains no exceptions to the written approval requirement. See *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir.1991) (*en banc*). In affirming the Fifth Circuit's decision, the Supreme Court held that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability." *Cowart*, \_\_\_ U.S. \_\_\_, 112 S.Ct. at 2595, 26 BRBS at

51-52 (CRT). Thus, the claimant became a person entitled to compensation at the time he suffered his work-related injury. Despite the employer's conceded knowledge of the settlement,<sup>6</sup> the Court held that the claimant was required to obtain the employer's written approval of the settlement pursuant to Section 33(g)(1).<sup>7</sup>

As claimant and the Director assert in their respective briefs, the Supreme Court in *Cowart* did not consider the issue at bar, *i.e.*, whether a potential widow is a "person entitled to compensation" under Section 33(g)(1) prior to the death of her spouse, and thus whether that subsection would act as a bar to the widow's subsequent death benefits claim where the widow and decedent settled third-party claims without written approval prior to his death. Applying *Cowart* to the present claim, it is clear that decedent's pre-death settlements and his obligation to obtain employer's consent to those settlements are relevant to decedent's claim for disability benefits accruing prior to his death and not to his widow's claim for death benefits. As Judge Brown so cogently details in

<sup>6</sup> Because the issue had not been briefed, the Court did not discuss the effect of employer's participation in the settlement. *Cowart*, \_\_\_ U.S. \_\_\_, 112 S.Ct. at 2598, 26 BRBS at 53 (CRT).

<sup>7</sup> The Court noted that a claimant is required to provide notice of a settlement under Section 33(g)(2), but not written approval, in two instances: "(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability." *Cowart*, \_\_\_ U.S. \_\_\_, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT).

his concurring opinion, the facts of this case clearly demonstrate the relationship of the pre-death third-party settlements to the pre-death disability claim and the post-death settlements to the death benefits claim. Decedent entered into a Section 8(i) settlement of his disability claim in May 1983 for a lump sum of \$15,000, medical benefits, which ultimately amounted to \$454.50, and an attorney's fee. Employer's total liability for compensation and medical benefits was \$15,454.50, which was employer's lien in the third-party suit. The pre-death settlements netted a greater amount, sufficient to satisfy employer's lien in full. I fully agree with my colleague that since the amount of the pre-death settlements exceeded the compensation due decedent, written approval of those settlements was not required under Section 33(g)(1). Moreover, failure to obtain approval of those settlements cannot bar the subsequent claim for death benefits by decedent's widow, claimant herein. At the time of the pre-death settlements claimant had no vested right to death benefits.

In his decision, the administrative law judge found that under Section 9 of the Act, 33 U.S.C. §909, and Section 702.241 of the regulations, 20 C.F.R. §702.241, claimant's claim for death benefits is separate and distinct from decedent's claim for disability and medical benefits. See Decision and Order at 8-10. Thus, the administrative law judge determined that "the Act embodies the concept that [claimant's] action for death benefits would not be recognizable until [decedent's] death occurred." *Id.* at 9. Accordingly, after further finding that Congress did not confer a cause of action for Section 9 death benefits prior to the death of the injured employee,

the administrative law judge determined that claimant, for purposes of Section 33(g)(1), could not have been deemed a "person entitled to compensation" until decedent's death occurred. In response to employer's contentions of error, claimant similarly asserts that her right to file a claim for death benefits did not vest until decedent's death from his work-related injury and, therefore, it is impossible for her to be deemed a "person entitled to compensation" before her husband's death.<sup>8</sup>

Both the United States Court of Appeals for the Fifth Circuit, wherein appellate jurisdiction of this case lies, and the Board have previously recognized the distinction between disability and death benefits claims. See *Travelers Insurance Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5th Cir.1981); *Close v. International Terminal Operations*, 26 BRBS 21 (1992). In *Marshall*, the Fifth Circuit noted that a cause of action for death benefits does not arise until death. Similarly, in *Close*, a case which involved the question of whether Section 9 under the 1972 Amendments or 1984 Amendments applied, the Board held that the right to death benefits is separate and distinct from the right to

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<sup>8</sup> Claimant also argues that *Cowart* is inapplicable to the instant case because the Supreme Court there interpreted Section 33(g)(1) as amended in 1984. This contention is without merit. In *Cowart*, the Supreme Court noted that while Congress redesignated then subsection 33(g) to what is now (g)(1) by virtue of the 1984 Amendments, the phrase "person entitled to compensation" was not changed. *Cowart*, \_\_\_ U.S. \_\_\_, 112 S.Ct. at 2589, 26 BRBS at 50 (CRT). It is also noted that claimant has never asserted, at the administrative law judge level or before the Board, that the 1984 Amendments to Section 33(g) are not applicable because the pre-death settlements were executed prior to the effective date of the 1984 Amendments.



disability benefits, and does not arise until the death of the employee occurs. This interpretation is supported by the Act,<sup>9</sup> which sets forth two separate and distinct classes of claimants who may have a right to benefits, *i.e.*, injured employees who seek disability benefits and the spouses of injured employees who, as a result of the employees' work-related deaths, seek death benefits, *see* 33 U.S.C. §§908, 909, as well as Section 702.241(g) of the implementing regulations, which states that an agreement among the parties to settle a claim "shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits." 20 C.F.R. §702.241(g).

Moreover, this distinction between disability and death claims is supported by the decision of the Supreme Court in *Cowart*. Specifically, in determining when the claimant in that case became "a person entitled to compensation," the Court stated that "the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right." *Cowart*, \_\_\_ U.S. \_\_\_, 112 S.Ct. at 2595, 26 BRBS at 51 (CRT). The Court held that the claimant Cowart became "a person entitled to compensation" at the

<sup>9</sup> In setting forth the enactment dates for the 1984 Amendments to the Act, Congress specifically stated that the amended Section 9 was to apply to any death occurring after September 28, 1984. *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub.Law 98-426, §28(d), 98 Stat. 1639, 1655; *see generally* *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100, 103 n. 1 (1990), *aff'd on recon.*, 26 BRBS 32 (1992).

moment his right to recovery vested. *Id.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). In the instant case, claimant's right to death benefits under the Act could not have vested *before* she became a widow. As the Director notes, numerous events may occur which could affect a spouse's future claim for death benefits before that spouse's right to death benefits vests; for example, the employee may die of a non-work related ailment, the employee's spouse may predecease the employee, a divorce may occur, or the law may change. The occurrence of any of these events would preclude a vesting of a right to death benefits under the Act. In *Marshall*, 634 F.2d at 843, 12 BRBS at 922, the Fifth Circuit noted the interrelationship between one of these pre-death factors, specifically the employee's injury and the employee's subsequent death, stating that death is not the only operative fact relevant to a determination of the availability of death benefits under the Act. Rather, while a cause of action for death benefits does not arise until death, the existence of a maritime-related injury must still be established.<sup>10</sup> Thus, as numerous unforeseen events can terminate a potential entitlement to compensation if they occur prior to the employee's death, the right to recover death benefits cannot arise, or vest, until, at a minimum, an employee's death occurs leaving behind a surviving spouse. Accordingly, we reject employer's contention that the spouse of an injured employee is "entitled" to death

<sup>10</sup> Similarly, the United States Court of Appeals for the First Circuit in *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1st Cir.1979), acknowledged that the right to death benefits under the Act arises at death.

benefits prior to the actual work-related death of the employee.

We note that the United States Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir.1993), *aff'g in part and rev'g in part* 24 BRBS 35 (1990), declined to extend the Supreme Court's statement that a person does not become "entitled to compensation" until the right to recovery vests, to the situation where a spouse and daughter of an employee settled their third-party tort actions prior to the death of the employee. Rather, the court in *Cretan* held that an injured employee's spouse and daughter were persons "entitled to compensation" at the time pre-death settlements were entered into and were therefore subject to the provisions of Sections 33(f) and (g). We, however, decline to accept this interpretation of Section 33(g)(1), as it is contrary to the Supreme Court's language in *Cowart*.<sup>11</sup> In our opinion, the decision of the Supreme Court in *Cowart*, as well as the Fifth Circuit's holding in *Marshall*, clearly supports a determination that a spouse's right to death benefits does not vest until he or she becomes a widower or widow upon the death of the injured employee. We therefore hold that at the time of the pre-death settlements in this case, claimant was not a "a

<sup>11</sup> In fact, the Ninth Circuit, after noting that the language used by the Supreme Court regarding vesting did not refer to the facts in the case before the court, characterized the Court's statement as dicta and stated "[we] decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended." *Cretan*, 1 F.3d at 847, 27 BRBS at 98 (CRT).

person entitled to compensation," and thus was not subject to the requirements of Section 33(g)(1). Accordingly, we affirm the administrative law judge's finding that claimant's death benefits claim was not barred by Section 33(g)(1) of the Act.

## II. Section 33(f)

We now address claimant's contention on appeal that the administrative law judge erred in finding that employer was entitled to credit the entire net proceeds of the post-death settlements entered into by claimant and decedent's six children against its compensation liability to claimant. In his Decision and Order, the administrative law judge rejected employer's argument that under Section 33(f),<sup>12</sup> claimant is not entitled to an apportionment of the post-death settlement proceeds. Instead, the administrative law judge found that under Mississippi's wrongful death statute, "[d]amages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children, all shall go

<sup>12</sup> Amended Section 33(f) provides:

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f) (1988).



to his wife." MISS. CODE ANN. §11-7-13 (1972).<sup>13</sup> See Decision and Order at 18. Thus, the administrative law judge rejected employer's argument that claimant was attempting to obtain a double recovery since, under operation of the Mississippi statute, claimant was entitled to only one-seventh of the post-death settlement proceeds, and the evidence showed that claimant in fact received only one-seventh of the proceeds of those settlements. Tr. 27-28. The administrative law judge determined that under operation of state law, the settlement proceeds were apportioned among the parties, and that claimant never made any claims concerning apportionment according to the types of damages she received.

The administrative law judge went on to find, however, that as a matter of contract, employer was entitled to offset the total net amounts of the third-party post-death settlements, since language to this effect was contained in each of the three post-death settlements entered into by claimant and decedent's six non-dependent children, and approved by employer. The administrative law judge cited the pertinent language in the settlements entered into with Raymark, Wellington and Johns-Manville respectively. With regard to Raymark, the agreement states:

Releasors do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits

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<sup>13</sup> Since the federal third-party law suit was filed in Mississippi, the administrative law judge noted that the federal district court was required to apply Mississippi state law. See Decision and Order at 18.

under any state or federal law or statute, including but not being limited to the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to any *Releasor* shall first be given credit for the consideration paid to *Releasors* under this agreement, less reasonable cost collection, and shall make no payment of any compensation benefits to any *Releasor* until the consideration paid to *Releasors* under this agreement is exhausted. . . .

Emp. Ex. 21 at 4-5 (emphasis added).

The Wellington "Final Judgment Approving Settlement and Dismissing with Prejudice" states:

The Court finds that the above offer of settlement is reasonable and in the best interest of said parties, and it is therefore, approved, provided that if any claim be pending or hereafter filed by the plaintiff, the decedent's heirs, or anyone in privity with them for benefits under the Mississippi Workers' Compensation Act, the Federal Longshoremen's and Harbor Workers' Compensation Act, or any other law which provides benefits to be paid by the decedent's employer, and/or insurance carrier, and any such employer and/or insurance carrier be ordered to pay such benefits resulting from or in any way related to any matter, fact, or thing appearing in the Complaint filed in this cause,

then under the provisions of the applicable compensation act such employer and/or its insurance carrier shall first be given *credit for the net amount of the aforesaid sum accruing to the plaintiff and the decedent's heirs.*

Emp. Ex. 21 at 20-21 (emphasis added). The administrative law judge noted that the Wellington settlement itself uses the same language as cited above in the Raymark settlement. Emp. Ex. at 31-32. He also acknowledged that the settlement with Johns-Manville uses different language, to wit:

The undersigned further agree to be responsible for the required reimbursement of all outstanding medical bills and/or worker compensation benefits paid to or on behalf of the undersigned to date, and shall indemnify and hold harmless the TRUST up to the amount of this settlement for any such sums adjudicated to be a lien upon this settlement.

Emp. Ex. 21 at 46. The administrative law judge noted, however, that the agreement also contains language similar to that used in the Raymark settlement, which gives employer credit for the entire amount of the net proceeds.<sup>14</sup> Emp. Ex. 21 at 47-48. Thus, the administrative

<sup>14</sup> This clause of the settlement states:

The undersigned do hereby represent and warrant to the TRUST that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including, but not being limited to, the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to

law judge concluded that with respect to the three post-death settlements, claimant is contractually obligated to give employer credit for the entire amount of the net proceeds, not only the one-seventh share she received.<sup>15</sup>

On appeal, claimant and the Director argue that the administrative law judge misinterpreted the language of the post-death settlements and contend that the settlements cannot give employer an offset for the amounts which decedent's heirs received. Claimant and the Director further argue that since decedent's heirs did not file their own claims under the Act, they are not "persons entitled to compensation" under Section 33(f) and, thus, that subsection cannot be used to entitle employer to offset the amounts which they received as a result of the post-death settlements. In its cross-appeal, employer challenges the administrative law judge's holding that Section 33(f) allows it a credit for only the net proceeds received by the claimant under the Act, contending that it

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be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to *either of the undersigned shall first be given credit for the consideration paid to the undersigned under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.*

Emp. Ex. 21 at 47-48 (emphasis added).

<sup>15</sup> The administrative law judge noted that this contractual obligation was recognized by the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir.), cert. denied, 484 U.S. 976 (1987).



should be entitled to offset the entire net amount of the proceeds recovered against the third-parties.

We agree with claimant and the Director that the administrative law judge erred in finding employer to be entitled to an offset for the total net proceeds of claimant's post-death settlements. Initially, the administrative law judge properly found that under Section 33(f), the settlement was clearly apportioned among the parties in the third-party action. Section 33(f) states that if "the person entitled to compensation" files a third-party lawsuit, employer is required to pay the excess of the amount which the Secretary determines is payable under the Act, "over the net amount recovered against such a third person." 33 U.S.C. §933(f). In the instant case, the settlement amounts were apportioned among claimant and her six non-dependent adult children consistent with Mississippi law. Only claimant filed a claim under the Act and was entitled to benefits. Therefore, only she can be deemed "a person entitled to compensation" under Section 33(f). See *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir.1991), *aff'g in part and rev'g in part Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1 (1989).<sup>16</sup>

Employer urges, nonetheless, that we affirm the administrative law judge's determination that it was entitled to offset the full net amount of the settlements, as this decision was made not as a matter of law under

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<sup>16</sup> We therefore reject employer's argument that the administrative law judge should have found it entitled to a full credit of the net proceeds of the post-death settlements as a matter of law.

Section 33(f), but as a matter of contract. We reject this argument, as the administrative law judge's decision is contrary to law. Initially, we disagree with employer's contention that the decision of the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987), mandates affirmance of the administrative law judge's findings on this issue. In *Wilfred*, the Fifth Circuit held that the employee's widow, in signing a third-party settlement agreement, obligated herself to give employer a credit for all sums which she received as a result of that agreement. Unlike the employer in *Wilfred*, who actually was a party to and signed the third-party settlement agreement, employer herein was not a party to the third-party settlements, but merely approved those settlements. Thus, employer did not enter into a contract with the third party regarding the settlement proceeds. I completely agree with my concurring colleague's analysis of the contractual rights of claimant and employer and their effect on Section 33(f). Employer was neither a party to the contracts nor can it be considered a third-party beneficiary. Moreover, as Judge Brown points out, language in the contract with Raymark indicates employer is to receive credit for sums received by claimant. The court in *Wilfred* recognized claimant's obligation to give employer credit only for those sums which she herself had received, which is the result we hold is proper in the case at bar. Claimant here received only one-seventh of the settlement proceeds, and only the amounts received are subject to the offset.

Finally, we agree with the Director that, assuming, *arguendo*, the administrative law judge correctly interpreted the language of the post-death settlements as entitling employer to a credit of the entire net proceeds of the settlements, enforcement of such language would be tantamount to a waiver of claimant's compensation which is precluded by Section 15(b) of the Act, 33 U.S.C. §915(b).<sup>17</sup> While our dissenting colleague maintains that Section 15 cannot be applied to the instant case since that section invalidates only agreements between employees and employers, we believe that to allow the surviving spouse of an employee seeking benefits under the Act to step into the shoes of the employee is a fair application of Section 15, and is consistent with the Supreme Court's requirement that the Act be liberally construed in order to effectuate its remedial purposes. See *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 281, 14 BRBS 363, 368 (1980). We therefore vacate the administrative law judge's finding that employer is entitled to a credit of the total proceeds of the post-death settlements, and hold that employer is entitled to offset only the amount claimant received in the post-death settlements, not the amounts received by decedent's other heirs.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is modified to reflect that employer is entitled to offset only claimant's one-seventh

<sup>17</sup> Section 15(b) of the Act provides:

No agreement by an employee to waive his right to compensation under this chapter shall be valid.

33 U.S.C. §915(b).

share of the post-death settlements against its compensation liability. In all other respects, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

BROWN, Administrative Appeals Judge, concurring:

Factually this is an unusual case and, in many respects, it is a case of first impression. Decedent, Jefferson Yates, worked as a shipfitter for Ingalls Shipbuilding, Incorporated for periods during 1953 and 1967 during which time he was exposed to asbestos particles. In March 1981, he was diagnosed as suffering from asbestosis and several other conditions. On April 16, 1981, he filed a claim against employer for benefits under the Longshore and Harbor Workers' Compensation Act. On May 26, 1981, he also filed a third-party lawsuit in the United States District Court for the Southern District of Mississippi against 23 manufacturers of asbestos products.

#### I. Section 33(g)(1)

Between April 1982 and March 1984 Mr. Yates entered into settlements with Armstrong, Garlock, Rockwool, and H.K. Porter, Inc., four of the defendants in the third-party suit. On May 5, 1983, he entered into a Section 8(i), 33 U.S.C. §908(i) (1982), settlement of his Longshore claim with employer for a lump sum of \$15,000, medical benefits and attorney's fees. The settlement was approved



by the deputy commissioner on May 10, 1983. Subsequently, decedent entered into additional third-party settlements with GAF Corp., Owens-Corning Fiberglass and Owens-Illinois Inc. Decedent's wife, Maggie Yates, was not a party in the third-party suit but did sign the settlement agreements as a co-releasor. As to the seven settlements entered into during decedent's lifetime, written approval by employer was not obtained.

Decedent died on January 28, 1986. On April 22, 1986, his widow, claimant, filed a claim for death benefits under the Act against employer. Furthermore, claimant and decedent's six non-dependent adult children continued the third-party suit against the remaining asbestos defendants, which was then treated as a wrongful death action. Subsequently, claimant and the six children entered into settlements with Raymark on May 10, 1988, for \$2,821, Wellington on April 4, 1989, for \$60,000 and Johns-Manville on June 19, 1989, for \$43,000. Written approval of these three settlements was obtained from employer and LS-33 forms were filed. Emp. Ex. 22.

The first issue presented by the appeals is whether claimant's claim for death benefits is barred by Section 33(g)(1) of the Act which, as amended in 1984, holds, in effect, that when a person entitled to compensation enters into a settlement with a third person for an amount less than the compensation to which the person would be entitled under the Act, the employer shall be liable for compensation in excess of the net third-party recovery only if the employer and its carrier gave written approval prior to execution of the settlement. It is conceded that written approval was not obtained in connection with the seven settlements executed prior to decedent's death.

Employer takes the position that claimant's death claim under the Act is barred because she participated in the pre-death settlements as a co-releasor and written approval was not obtained. The administrative law judge held that Section 33(g)(1) did not bar claimant because at the time of the pre-death settlements she was not a "person entitled to compensation" in that any claim for death she might have did not vest until decedent's death. The Director also takes this position.

Any discussion of the meaning of the phrase "person entitled to compensation" must begin with *Cowart v. Nicklos Drilling Co.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992). The Supreme Court held that a claimant became a person entitled to compensation at the time of a work-related injury and that it was immaterial whether claimant was receiving compensation at the time of a third-party settlement. There were two sentences which the Supreme Court used to pinpoint its holding and which must be read together: "Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Cowart*, \_\_\_ U.S. \_\_\_, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). We, thus, have a clear guide as to the meaning of a "person entitled to compensation" where we have an injured employee who has a potential compensation claim and who files a third-party suit which he settles as the only party-in-interest. However, as claimant and the Director assert, the Supreme Court in *Cowart* did not have before it the

question of whether a potential widow is a "person entitled to compensation" prior to the death of her husband, as in this case. Much was made of this issue by the administrative law judge and by the parties, including the Director, in their briefs. *Travelers Insurance Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5th Cir.1981), is cited to show a distinction between disability and death claims. In *Cowart*, the court was dealing with a traumatic injury to a hand. Under those circumstances the right to recovery vested at the time of injury. In *Travelers*, however, the court pointed out that although the source of liability for death benefits under the Act is traced back to a maritime injury, it is clear that a cause of action for death benefits under Section 9 of the Act does not arise until death. That is the time the cause of action for death benefits vests. Based on this rationale, I agree with Judge McGranery that Section 33(g)(1) is not a bar to claimant in this case.

There is an additional reason why the right to further compensation is not barred in this case. Section 33(g)(1) of the Act bars further compensation if the person entitled to compensation settles a third-party claim *for an amount less than [sic] the person would be entitled to under the Act* without first obtaining written approval of employer and its carrier. Here, however, the pre-death settlements were for a net amount greater than what Mr. Yates would have received under the Act. Strangely, this obvious fact was never mentioned by any of the parties, the Director, or the administrative law judge. As stated above, Mr. Yates entered into a Section 8(i) settlement of his claim with employer on May 5, 1983, for the lump sum of \$15,000, medical benefits and attorney's fees. As a result of providing \$454.50 in medical benefits, plus the lump

sum, the total compensation and medical costs amounted to \$15,454.50, and this amount constituted employer's total lien in the third-party suit. According to the record, the gross amount of the lifetime settlements with Armstrong, Garlock, H.K. Porter, Inc., GAF, Owens-Corning Fiberglass and Owens-Illinois was \$31,350, Emp. Ex. 13, less a 40 percent attorney's fee of \$12,575, leaving a net to Mr. Yates of \$18,775.<sup>1</sup> Employer had notice of the settlements, asserted its lien and was paid in full \$15,454.50. The lien was paid in two installments, \$14,127.59 on January 31, 1984, out of the pre-death settlements, and the balance of \$1,327.29 on June 20, 1988, with proceeds from the settlement with Raymark, one of the approved post-death settlements. See Emp. Ex. 14. Since the Section 8(i) compensation settlement clearly determined and liquidated the amount of compensation to which Mr. Yates would be entitled and since the pre-death settlements were for a greater amount, and with employer receiving complete satisfaction of its lien, written approval of the settlements was not compelled by Section 33(g)(1). That section, therefore, would not bar a claim for further compensation by Mrs. Yates. As stated above, with the written approval of the three post-death settlements, there is no statutory bar to her right to further compensation.

## II. Section 33(f)

I concur in the rationale of Judge McGranery's discussion of Section 33(f) and the conclusion that employer

<sup>1</sup> The parties did not include in the computation the \$10 token consideration in the settlement with Rockwool. See Emp. Ex. 23 setting forth the gross and net amounts of all settlements.



is entitled to offset only the amount received by claimant in the post-death settlements and not the amounts received by decedent's other heirs.

Upon the death of Mr. Yates, claimant's inchoate right to a possible death action became vested. She was then in the position of a "person entitled to compensation." Section 33(f) provides that when such person recovers from a third person, employer may be required to pay additional compensation in an amount determined by the Secretary over the net amount received by "such person" in the third-party actions. Clearly this refers solely to Mrs. Yates, and not the six adult children, who, because they were adult and nondependent, were not entitled to a possible claim under the Act and who, in fact, never filed a claim under the Act. *See Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir.1991), *aff'g in part and rev'g in part Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1 (1989) (in which the court held that Section 33(f) allows the employer to offset only that portion of a third-party settlement attributable to claimant). This view was also adopted by the United States Court of Appeals for the Fourth Circuit in *I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7 (CRT) (4th Cir.1992), *modifying on recon.*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.1992), *cert. denied*, 113 S.Ct. 1579 (1993), wherein it adopted the view of the Ninth Circuit and held that employer's offset rights are limited to the portion intended for claimant.

Despite the literal reading of Section 33(f) and the interpretation by two Courts of Appeals, employer contends that the releases in the Raymark, Wellington and Johns-Manville cases executed by claimant and the six

adult children constituted a contract whereby employer was entitled to a complete offset of all monies received by all heirs rather than the one-seventh received by claimant. Employer, however, was not a party to the release agreements. It was not a signatory. They were entered into by claimant and the heirs, pursuant to a right granted by Mississippi statutory law, with three of the defendants in the third-party suit. Is employer contending it is a third-party beneficiary? It has not made any such assertion, nor does it appear that it would qualify. Such a contract must have been intended for the benefit of the third person. Absent such intent, the third person is merely an incidental beneficiary with no right to enforce the contract. The intent of the parties must be determined by the terms of the contract as a whole in the light of the circumstances under which it was made. The releases in question contain much more than the paragraph referring to credit. The body of each release is eight pages long covering, in boilerplate language, every conceivable claim, cause of action, lien, subrogation right, remedial right, direct or indirect, that could possibly be asserted against the third-party defendants, including any such action by Ingalls Shipbuilding, Incorporated, the employer in this case. *See generally* 17A Am.Jur.2d Contracts, §§440, 441. Clearly, the intent of the releases was to protect Raymark, Wellington and Johns-Manville from any and all possible actions arising as a result of Mr. Yates' exposure to asbestos during the course of his employment. The releases were not for the benefit of Ingalls other than incidentally, and as a matter of law they do not benefit Ingalls over and above what is

already contained in the provisions of Section 33(f) of the Act.

Of particular interest as to the intent of the releases, there is an acknowledgment in the record, employer's own exhibit, identified as Emp. Ex. 21 p. 17 of 57, which strangely has not been mentioned by anyone so far in this case. The acknowledgement, executed by claimant on April 27, 1988, in connection with the settlement with Raymark, one of the three post-death settlements, states her understanding that if successful in her compensation claim against Litton Systems, Inc. (actually the Ingalls subsidiary of Litton) that Litton "*will be given credit for the amount of money paid to me by Raymark and that Litton will owe no further compensation 'until the amount received by me from the above mentioned Defendant has been exhausted. . . .'*" [emphasis added]. This acknowledgement is evidence of claimant's understanding that only the amount she received would be credited to the offset.

I further concur with Judge McGranery who agrees with the Director that to interpret the releases in the post-death settlements to give credit of the entire net proceeds would be tantamount to a waiver of claimant's compensation that is precluded by Section 15(b) of the Act.

Accordingly I, too, would modify the administrative law judge's Decision and Order to reflect that employer is entitled to offset only claimant's one-seventh net share of the post-death settlements against its compensation liability and affirm the Decision and Order in all other respects.

SMITH, Administrative Appeals Judge, concurring and dissenting:

I fully agree with the lead opinion affirming the administrative law judge's determination that claimant was not "a person entitled to compensation" at the time of the pre-death settlements and, thus, that Section 33(g)(1) does not bar claimant's claim for death benefits. I respectfully dissent, however, from my colleagues' holding that claimant is entitled to an apportionment of the proceeds of the post-death settlements, such that employer is entitled to offset only the net amount claimant received from those settlements, not the amounts decedent's heirs received. I agree with the administrative law judge's findings on this issue, and would hold that by virtue of the specific language contained in the post-death settlements, claimant waived her right to apportionment.

The administrative law judge found that by operation of Mississippi law, claimant was entitled to an apportionment of the proceeds of the post-death settlements. See Decision and Order at 18. The majority points out that Section 33(f) of the Act, 33 U.S.C. §933(f), mandates such an apportionment as well. I am not in disagreement with these views. It is with regard to the applicability of Section 15, 33 U.S.C. §915, and its relation to the settlements, that I part company with the majority's opinion. The majority holds that even if the administrative law judge correctly construed the language in the post-death settlements as a waiver of claimant's right to an apportionment, enforcement of such language would be in violation of Section 15 of the Act. Section 15(a) and (b) of the Act provide:

- (a) *No agreement by an employee to pay any portion of premium paid by his employer to a carrier*



or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and *any employer* who makes a deduction for such purpose from the pay of *any employee* entitled to the benefits of this chapter shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000.

(b) No agreement *by an employee* to waive his right to compensation under this chapter shall be valid.

33 U.S.C. §915(a), (b) (emphasis added). Read together, I believe Section 15 invalidates agreements between only employees and their employers, in situations where the employer either deducts pay from the employee for the purpose of contributing to his own compensation, or where the employee seeks to waive his right to compensation. Based upon this interpretation of Section 15, I do not believe that this section of the Act is applicable to the instant case, as claimant was not an employee of employer. Moreover, the post-death settlements were agreements between claimant, decedent's heirs and three third-party defendants; employer was not a signatory to these agreements. Thus, a strict reading of Section 15 dictates that this section does not apply to the instant situation.

The language of the post-death settlements, as cited by the majority, does appear to waive claimant's right to an apportionment of the post-death settlements, a waiver that has been recognized by the United States Court of Appeals for the Fifth Circuit in *St. John Stevedoring Co.*,

*Inc. v. Wilfred*, 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987). I believe that Section 15 does not invalidate this waiver. Accordingly, I would affirm the administrative law judge's finding and hold that as a matter of contract, employer is entitled to a credit of the entire net proceeds of the post-death settlements, not just claimant's one-seventh share.

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In the Matter of  
MAGGIE YATES, SURVIVING  
WIDOW OF JEFFERSON YATES,  
Claimant  
v.  
INGALLS SHIPBUILDING INC.,  
Employer  
and  
AMERICAN MUTUAL LIABILITY  
INSURANCE COMPANY, IN  
LIQUIDATION BY AND  
THROUGH THE MISSISSIPPI  
INSURANCE GUARANTY  
ASSOCIATION,  
Carrier

CASE NO.:  
91-LHC-324  
OWCP NO.:  
6-59522

## SYLLABUS

## Digest Section

3601; The ALJ found that claimant's joinder in third  
3706 party partial settlements prior to decedent's  
death did not bar, under Section 33(g), her  
subsequent claim for death benefits under  
the Act. Insofar as potential widows are con-  
cerned, Congress did not intend the words  
"person entitled to compensation" to encom-  
pass them. Therefore, they are exempt from  
the requirements of written approval prior to  
their husbands' death. Accordingly, Section  
33(g)(1) was inapplicable to the settlements  
of claimant's cause of action against the third

party defendants. The claim was not barred by Section 33(g)(2) since employer not only received notice of all the settlements, but also reaped the benefit of them, having received proceeds from the pre-death settlements, as well as the wrongful death settlement, as reimbursement for its 1983 settlement with decedent.

1801[7][a]; Claimant's attorney fee, which was based on  
3704 a 40% contingency fee contract, was reason-  
able. Therefore, the full amount of such fee  
shall be deducted as an expense in determin-  
ing the net amount of claimant's third party  
recovery under Section 33(f) of the Act.  
Additionally, employer's lien and/or credit  
for the net amounts of the post-death third  
party partial settlements extended to net  
amounts received by non-dependent heirs-  
at-law of decedent, due to the contractual  
obligations of those settlements.

**APPEARANCES:**

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**BEFORE: QUENTIN P. McCOLGIN**  
**Administrative Law Judge**

### **DECISION AND ORDER - AWARDING BENEFITS**

This is a claim for death benefits pursuant to the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (the Act). Maggie Yates, surviving widow of Jefferson Yates, seeks death benefits from her deceased husband's employer, Ingalls Shipbuilding, Inc., and its carrier, Mississippi Insurance Guaranty Association for injuries he sustained as a result of his employment.

This case was referred to the Office of Administrative Law Judges on October 30, 1990. The matter was called for formal hearing on June 7, 1991. The parties were afforded an opportunity to present evidence and argument in support of their respective positions at the hearing. Briefs were submitted by the parties' post-hearing. To the extent that proposed findings are not adopted, they are rejected as either inaccurate or unnecessary for the disposition of this case. Having considered all of the evidence presented, the undersigned does hereby issue the findings, conclusions and order set forth below.

### **STIPULATIONS**

At the outset of the hearing, the parties stipulated that:

1. Decedent was diagnosed with asbestosis on April 17, 1981, and he died on January 28, 1986.

2. Decedent died due to asbestos exposure.
3. An employer-employee relationship existed at the time of injury.
4. The injury arose in the course and scope of employment.
5. Employer was notified of the injury on April 17, 1981 and of the death on April 22, 1986.
6. Notice was given pursuant to Section 12 of the Act to employer on April 17, 1981 (injury) and April 22, 1986 (death), and to the Secretary on April 17, 1981 (injury) and April 22, 1986 (death).
7. Controversions were filed on May 1, 1981 and May 21, 1986.
8. No informal conference was held.
9. Disability resulted from the injury; however, the claim was settled pursuant to Section 8(i) of the Act on May 5, 1983.
10. Medical benefits were paid in the amount of \$820.15 pursuant to Section 7 of the Act.
11. Decedent received an 8(i) settlement in the amount of \$15,000.00 plus open medicals and an attorney fee of \$2,025.00 on May 15, 1983.
12. Decedent's average weekly wage was \$228.12.
13. Decedent reached maximum medical improvement on April 17, 1981.
14. Claimant was retired at the time of the asbestosis diagnosis.

15. None of decedent's children were dependent upon him at the time of his injury and death.

(JX-1; Tr. p. 37).

### ISSUES

At the time of the formal hearing, the following issues were in dispute:

1. Does the claimant's joinder in third party partial settlements prior to decedent's death bar her subsequent claim for death benefits under Section 33(g) of the Longshore Act?
2. Were claimant's attorney's fees for the third party settlements, based on a 40% contingency fee contract, unreasonable?
3. Does employer's lien and/or credit for net third party partial settlements extend to net amounts received by non-dependent heirs-at-law of decedent?

### STATEMENT OF THE CASE

The decedent, Jefferson Yates, worked for employer as a shipfitter for varying periods beginning in 1953 and ending on September 19, 1967. (RX-1). Subsequently, the decedent worked at various non-maritime employment until he voluntarily retired in 1974 at the age of 67. (RX-2).

On March 23, 1981, decedent was evaluated for asbestos-related diseases. At that time, medical tests revealed a small density in the lung, pleural thickening as

well as small nodular disease in both lower lungs. Subsequent pulmonary function studies revealed restrictive pulmonary impairment and moderately decreased pulmonary diffusion capacity. Decedent was therefore diagnosed as having asbestosis, chronic bronchitis and possible malignancy of the lungs. He was admitted to Springhill Memorial Hospital in Mobile, Alabama for fibrotic bronchoscopy [sic] and a transbronchial biopsy. Because of the resulting findings, a mediastinoscopy was performed. Bronchogenic carcinoma was suspected, but never confirmed. (RX-2).

On April 16, 1981, decedent filed a claim for benefits against [sic] employer under the Longshore Act. (RX-4). On May 26, 1981, he filed a third party lawsuit in the United States District Court for the Southern District of Mississippi, Southern Division, seeking damages against twenty-three (23) manufacturers of asbestos products to which decedent was exposed at employer's facility. (RX-7; Tr. p. 30). Claimant was not a party plaintiff in this third party action. Answers denying liability on the part of those third party defendants were filed in the Federal Court. (RX-21). Similarly, employer controverted the claim for compensation under the Longshore Act. (RX-6).

Some time after the filing of the third party lawsuit in Federal Court, some of the third party defendants began concluding partial settlements with both decedent and claimant. Although, as is shown by this record, claimant was never named as a plaintiff in the third party action, she signed all the settlements as a releasor. Pursuant to the agreed contingency fee contract, attorney for claimant received a 40% contingency fee from each partial settlement in addition to costs. (RX-13; Tr. p. 38).



On June 8, 1982, employer admitted the compensability of decedent's Longshore Act claim and tendered benefits. (RX-10). On May 5, 1983, an §8(i) settlement was obtained in his longshore case. The terms of the settlement awarded \$15,000.00 as a lump sum to decedent, with open medical benefits for him, and an award of attorney fees in the amount of \$2,025.00. (RX-11). Payment was made by employer pursuant to an Order of May 10, 1983. (RX-12).

However, during decedent's lifetime and before the employer admitted the compensability of decedent's longshore claim, decedent entered into the following third party partial settlements on the following dates for the following gross and net amounts:

Combustion Engineering, Inc.	05/13/81	\$1,500.00	\$650.00
Armstrong Cork Company	03/29/82	\$ 500.00	\$300.00
Garlock, Inc.	05/20/82	\$ 300.00	\$180.00
Rockwool Manufacturing Co.	05/20/82	\$1,200.00	\$720.00

After employer admitted the compensability of decedent's longshore claim, but before the §8(i) settlement was reached, decedent entered into the following third party partial settlement on the following date for the following gross and net amount:

H.K. Porter Co., Inc.	05/21/83	\$7,250.00	\$4,350.00
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After the §8(i) settlement was entered and paid, decedent received third party partial settlements from the following third party defendants:

GAF Corporation	01/11/84	\$6,000.00	\$3,600.00
Owens Corning Fiberglass	01/30/84	\$14,300.00	\$8,580.00
Owens Illinois Inc.	01/31/84	\$3,000.00	\$1,775.00

(RX-13; RX-23).

Although in some of the earlier third party settlements, the language chosen limited claimant's release of claim to that of loss of consortium (RX-13 at pp. 1-4, 12-16), other settlements were clearly written to foreclose claimant from subsequently initiating a wrongful death action. Nevertheless, none of the settlements attempted to foreclose employer from bringing its own third party suit. (RX-13 at pp. 7-10, 17, 20-21).

In January 1986, decedent's condition deteriorated and he died on January 28, 1986. (RX-15; RX-16; Tr. p. 23). At the time of decedent's death, employer had paid approximately \$454.50 over and above credits in medical benefits. Employer's lien was reimbursed out of three third party settlements. Two of the settlements were entered into before claimant's death; the last one afterwards. (RX-14).

On April 22, 1986, decedent's widow filed her claim for death benefits under the Act. (RX-17). The six natural children of decedent had long been adult non-dependents and thus were not joined in the claim. (Tr. p. 37). Employer controverted her claim on May 21, 1986, pending further investigation. (RX-18).

After decedent's death, the widow and her six children continued the Federal Court action which converted from a personal injury action to a wrongful death suit. The widow and children obtained the following wrongful death partial settlements from the following third party defendants on the following dates and listed gross and net amounts:

Raymark	05/10/88	\$ 2,821.00	\$ 1,880.67
Wellington	04/05/89	\$60,000.00	\$36,000.00
Johns-Manville	06/19/89	\$43,000.00	\$25,800.00

(RX-23).

LS-33 forms were filed on these third party partial settlements and were approved by employer. (RX-22).

Subsequently, employer reached the assumption that it could count, as a credit, all of the net proceeds from the wrongful death third party partial settlements. Employer thus concluded that it would be a "mathematical impossibility" that it would ever have to pay any benefits to claimant, in light of her age of 83, compared to the total net amount of the wrongful death partial settlements. Therefore, believing that the widow would not outlive the credit, employer, on October 13, 1988, filed a Motion to Amend its Answer, admitting the compensability of the widow's death claim and seeking a dismissal of the claim. (RX-24).<sup>1</sup>

In response, claimant informed employer that her share of the net amounts from the wrongful death third

<sup>1</sup> Notably, employer had already admitted the compensability of the claim by signing the LS-33 for the Raymark settlement. (RX-22).

party partial settlements was only one-seventh (1/7) due to the Mississippi Wrongful Death Statute, and therefore asserted that only her share of the net third party proceeds could be counted as a set-off for employer's liability to her for death benefits. (Tr. pp. 27-28).<sup>2</sup>

It is at this point that the Matter comes for resolution.

### DISCUSSION

**Does the claimant's joinder in third party partial settlements prior to decedent's death bar her subsequent claim for death benefits under Section 33(g) of the Longshore Act?**

Section 33(g) of the Act provides that

- (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this subsection for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the

<sup>2</sup> Accompanying her post-trial brief, claimant submitted copies of checks made out to her and her children from her attorney, allegedly showing the distribution of the Wellington and Johns-Mansville settlements. Those copies have not been admitted into evidence, as they were submitted after the record was closed, and no good cause was shown for their late admission. 29 C.F.R. §18.55 (1990). Further, such copies would not be entitled to any weight, as they are not copies of cancelled checks, but rather copies of unsigned checks.



employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). Approval shall be made on a form provided by the Secretary and shall be filed in the Office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlements obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this Act.

33 U.S.C. §933 (1988).

The Board has long held that the meaning of "person entitled to compensation" under §33(g)(1) is limited to one who is actually receiving compensation from employer at the time a third-party settlement is entered into. *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989), rev'd in part, 907 F.2d 1552, 24 BRBS 1 (CRT) (5th Cir. 1990); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988) (addressing 1984 Amendments); *Dorsay v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986). The Board has distinguished this holding under §33(g)(1) from §33(g)(2) and §33(f), the offset provision, wherein it has held that any claimant, including a potential widow, is a "person entitled to compensation" due to §33(g)(2)'s qualifying language. *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), aff'd in part, rev'd in part, *Force v. Director*,

*OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988); *Castorina v. Lykes Brothers Steamship Co.*, 21 BRBS 136 (1988). The Board has justified this distinction as preventing a claimant from obtaining a double recovery under §33(f), yet protecting him from the harsh result of no recovery under §33(g)(1). *Force, supra*, 25 BRBS (CRT) at 18; *Force, supra*, 23 BRBS at 4-5; *Castorina v. Lykes Brothers Steamship Co., Inc.*, 21 BRBS 136, 140-1 (1988); *Dorsey, supra*.

Despite this reasoning, the Fifth Circuit Court of Appeals has emphatically rejected the Board's position. In *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991) (en banc), aff'g 907 F.2d 1552, 24 BRBS 1 (CRT) (5th Cir. 1990) and *Petroleum Helicopters, Inc. v. Barger*, 910 F.2d 276 (5th Cir. 1990), the Fifth Circuit held that a literal reading of §33(g) did not provide for a distinction between those claimants receiving and those claimants not receiving benefits. The Fifth Circuit held all employee and widow claimants to the requirement of prior written approval. *Id.*, 927 F.2d at 832, 907 F.2d at 1554.

While recognizing that the Fifth Circuit has indicated that the matter is closed, *Id.*, 907 F.2d at 832, neither *Nicklos* nor *Barger* involved the situation of a potential widow. In *Barger*, decedent was killed during the work accident and thus no uncertainty existed as to his death. *Id.*, 910 F.2d at 276. Further, in a case in which the Fifth Circuit had been faced with a claim in which the wife had settled before her husband's death, the court noted that it did "not disagree necessarily with the reasoning of the [Board]," which in that case had held that the potential

widow was not a "person entitled to compensation" means one receiving benefits. *John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987). Therefore, the undersigned finds that, at least insofar as potential widows are concerned, Congress did not intend the words "person entitled to compensation" to encompass them and they are thereby exempt from the requirement of written approval prior to their husbands' death. A cursory review of several provisions of the Act and corresponding regulations support this finding.

Unlike injured employees, a spouse of an injured employee has no cause of action under the Longshore Act until the injured employee dies from his work-related injury. A claim for death benefits would be premature if brought before the death occurred as no case or controversy would have yet arisen. 33 U.S.C. §908, §909 (1982). Under the present Act, the death must be related to the work injury in order for the widow to have a claim. 33 U.S.C. §909 (1988).<sup>3</sup> Until her husband's death, claimant could not relate this job-related disability to his death. Further, she could not have known ahead of time that she would outlive her husband, or that she would still be his wife at the time of his death.

The Secretary's regulations state that "[a]n agreement among the parties to settle a claim is *limited* to the rights of the parties and to claims then in existence; settlement of

<sup>3</sup> The 1984 Amendments deleted the provisions in §8 and §9 permitting an award for death benefits, no matter the cause of death, if the claimant was permanently disabled, with a non-schedule loss, due to a work injury at the time of death. 33 U.S.C. §908, §909 (1982).

disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits." 20 C.F.R. §702.241 (1990) (emphasis added). This regulation corresponds with case law. A widow's claim has been held to be separate and distinct from that of her husband, such that his settlement with employer for disability benefits does not foreclose a later claim by her for death benefits. *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1st Cir. 1979); *Abercrombie v. Chaparral Stevedores*, 22 BRBS 18 (1988); *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987).<sup>4</sup>

<sup>4</sup> Employer cites *Holden v. Shea, S & M Ball Co.*, 23 BRBS 416 (1990), *aff'd Shea v. Director, OWCP*, 929 F.2d 736, 24 BRBS 170 (CRT) (D.C. Cir. 1991), for the proposition that decedent's claim for disability benefits and claimant's claim for death benefits are not separate and distinct as they both arose from the same injury. However, *Holden* does not stand for that proposition. The issue in *Holden* was whether claimant had a cause of action, and whether the Board had subject matter jurisdiction, due to a change in the law between the date of decedent's injury and the date of death. Under the 1972 Longshore Act, which was in effect in the District of Columbia until 1982 when the new District of Columbia Workers' Compensation Act became effective, death benefits were owed if decedent died while permanently totally disabled due to a work injury, regardless of the cause of death. The new District of Columbia Workers' Compensation Act did not provide for such a remedy, nor did it have subject matter jurisdiction because the work injury occurred before its effective date. Because of this, the claimant in *Holden* would not have been entitled to any death benefits if the law in effect at the time of death governed. Therefore, in order to grant claimant any relief, and following the case law of the district



While the facts in this case do not involve claimant seeking a settlement for death benefits with employer before her husband's death, 20 C.F.R. §702.241 (1990) and case law support claimant's contention that the deputy commissioner could not entertain any request from her prior to her husband's death. Moreover, the Act embodies the concept that her action for death benefits would not be recognizable until death occurred. Her claim for death benefits did not prescribe when her husband's claim for disability benefits would have. Throughout the Act, the date from which time periods begin to run for death benefits, is from the date of death, as opposed to the date of injury. 33 U.S.C. §§912, 913, 914, 919, 930 (1988).

As the Fifth Circuit pointed out in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991) (en banc),

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and circuit in which it sat, the Board applied the General Savings Statute. That statute states, in pertinent part, that:

The repeal of any statute shall not have the effect to release or extinguish any . . . liability incurred under such statute, . . . and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability.

1 U.S.C. §109 (1982). Thus, decedent's death was related back to the law in the effect at the time of his work injury. 23 BRBS at 419.

Clearly, the facts in *Holden* are not analagous [sic] to the case at hand, and its holding is not applicable. However, the Board's continued treatment of the widow's claim as separate and distinct from that of her husband's is noted.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.*, 927 F.2d at 832, 24 BRBS (CRT) at 95, quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984).

Here, the intent is clear. Congress did not confer a cause of action for Section 9 death benefits prior to the death of the injured employee. Congress protected the right to commence such claim by tolling the applicable time periods for notification and the statute of limitations. Nothing in the Act supports the contention that a potential widow could submit a Request for Approval of Third Party Settlement even if she wanted to. As such, claimant could not have been deemed a "person entitled to compensation" until the death occurred. A holding otherwise would destroy the integrity of the Act. Thus, the undersigned finds that at the time of the pre-death settlements, Section 33(g)(1) of the Act did not apply to

the settlements of claimant's cause of action against the third-party defendants.

Nevertheless, claimant was still required to provide employer with notice of the settlements prior to being awarded benefits by an administrative law judge in order to prevent her claim from being barred under §33(g)(2). *Dorsey v. Cooper Stevedoring Co., Inc.*, 18 BRBS 25 (1986); *Armand v. American Marine Corp.*, 21 BRBS 305, 309 (1988), citing *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239, 243 (1988). "This construction of the statute protects employer's Section 33(f) lien interest by requiring that claimant, at a minimum, provide employer with notice of any settlement or judgment." *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42, 46 (1989), citing *Mobley, supra*.

Here, employer not only received notice of all the settlements, but also reaped [sic] the benefit of them. Employer received proceeds from the pre-death settlements, as well as the wrongful death settlement with Raymark, as reimbursement for its 1983 settlement with decedent. Thus, claimant's claim is not barred by §33(g)(2).

Were claimant's attorney's fees for the third party settlements, based on a 40% contingency fee contract, unreasonable?

Under the 1972 Act,<sup>5</sup> in this circuit, claimant's attorney was entitled to recover some portion of his fee from

<sup>5</sup> The 1972 Act provided that if claimant received an award under the Longshore Act, his right against any third party was assigned to employer unless he commenced an action against such party within six months of the award. 33 U.S.C. §933(b) (1972). The Act provided a formula for the distribution of the

the employer and/or his carrier who benefitted from the attorney's services. Claimant's contract with his attorney did not automatically govern the terms of the employer/carrier's contribution, and a *quantum meruit* approach was used to calculate the fee owed by the employer/carrier. Absent a finding by the court that the fee contract between claimant and his attorney was unreasonable,<sup>6</sup>

employer's recovery in suits it initiated in an injured longshoreman's name under §33(b), but contained no formula for the distribution of proceeds when claimant was successful in a suit he initiated against the third party. 33 U.S.C. §933(e) (1972). The employer's lien against a claimant's recovery was a judicial, rather than a legislative, creation. *Allen v. Texaco, Inc.*, 510 F.2d 977, 979-980 (5th Cir. 1975).

<sup>6</sup> It has long been recognized that district courts may review contingency fee contracts, even *sua sponte*, based on their supervisory powers over the attorneys practicing before them. Contingency fee contracts are set aside when the fee is so exorbitant that its collection offends attorney disciplinary rules. ABA Code of Prof. Resp., DR 2-106(A); ABA Code of Jud. Conduct, Canon 3, subd. B(3); *Ainsworth v. Vasquez*, 759 F.Supp. 1467 (E.D. Cal. 1991); *Holbrook v. Andersen Corp.*, 756 F.Supp. 34 (D. Me. 1991); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 921 F.2d 1371 (8th Cir. 1990) (Arkansas); *Pfeifer v. Sentry Ins.*, 745 F.Supp. 1434 (E.D. Wis. 1990); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990) (Oklahoma); *A Sealed Case*, 890 F.2d 15 (7th Cir. 1989) (Illinois); *In re Agent Orange Product Liability Litigation*, 818 F.2d 226 (2nd Cir. 1987) (New York); *Ochoa, supra*, 754 F.2d 1196 (5th Cir. 1985); *Boston & Maine Corp. v. Sheehan, Phiney, Bass & Green, P.A.*, 778 F.2d 890 (1st Cir. 1985) (Massachusetts); *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97 (3rd Cir. 1985) (Virgin Islands); *Cooper v. Singer*, 719 F.2d 1496 (10th Cir. 1983) (New Mexico); *Hoffert v. General Motors Corp.*, 656 F.2d 161 (5th Cir. 1981) (Texas); *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980) (Minnesota); *Haverstuck v. Wolf*, 491 F.Supp. 447 (D.C. Minn. 1980); *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105 (3rd Cir.



claimant either paid the remainder of the fee to his attorney or his attorney remitted the debt. *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274, 1276, 1281-2 (5th Cir. 1978).

While not mandating a formulistic approach in determining reasonableness, the Fifth Circuit suggested factors used in the calculation of attorney's fees in civil rights cases as a guide. Those factors are:

1. the time and labor required;
2. the novelty and difficulty of the questions;
3. the skill requisite to perform the legal service properly;
4. the preclusion of other employment by the attorney due to acceptance of the case;
5. the customary fee;
6. whether the fee is fixed or contingent;
7. time limitations imposed by the client or the circumstances;
8. the amount involved; and
9. the experience, reputation, and ability of the attorneys.

*Id.*, 579 F.2d at 1281 n. 10. *see also* ABA Code of Professional Resp., DR 2-106(B).

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1979) (Pennsylvania); *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274, 1281-2 (5th Cir. 1978); *Leve v. Schering Corp.*, 73 F.R.D. 537 (D.C.N.J. 1975); *Schlesinger v. Teitelbaum*, 475 F.2d 137 (3rd Cir. 1973); *Cappel v. Adams*, 434 F.2d 1278 (5th Cir. 1970).

In *Ochoa v. Employers National Ins. Co.*, 724 F.2d 1171, 17 BRBS 49 (CRT) (5th Cir. 1984), vacated and remanded, 105 S.Ct. 583 (1984), *aff'd* 754 F.2d 1196 (5th Cir. 1985), the Fifth Circuit held that where an employee's third party recovery was insufficient to cover both his attorneys' fees and the compensation lien, the lien was payable out of the net recovery, after costs of litigation, including reasonable attorneys' fees, were subtracted. *See also Valentino v. Rickners Rederi, G.M.B.H., SS Etha*, 552 F.2d 466 (2nd Cir. 1977). This holding became codified in §33(f) through the 1984 Amendments.<sup>7</sup>

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<sup>7</sup> The Bill to amend the Act, S. 1182, originally read that Section 33(f) was to be amended as follows:

"(f)(1) If the person entitled to compensation institutes proceedings within the period described in subsection (b) of this section, the employer shall be required to pay as compensation under this Act a sum equal to any amount by which the amount which the Secretary determines is payable on account of such injury or death exceeds the amount recovered in such proceedings against any such third person.

"(2) Any amount recovered by the person entitled to compensation on account of such proceedings by judgment or settlement, whether or not the settlement is approved by the employer in accordance with subsection (g) of this section, shall be distributed as follows:

"(A) The person entitled to compensation shall pay to the employer an amount equal to the sum of -

"(i) the cost of all benefits furnished to him by the employer under section 7; and

"(ii) all other amounts payable as compensation or benefits under this Act.

"(B) The person entitled to compensation or his representative shall retain the balance of the amount.

Section 33(f) states that

If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f) (1988).

Published cases show the deduction of attorneys' fees routinely being made. See e.g., *Maples v. Textports Stevedores Co.*, 23 BRBS 302, 304 (1990), *aff'd* *Textports Stevedores Co. v. Director, OWCP*, 931 F.2d 331 (5th Cir. 1991). However, the issue of the reasonableness of those fees has never been addressed in the context of adjusting

"(3) The employer will receive credit for future compensation or medical benefits from the amount retained by the employee under paragraph (2)(B), before payment of attorney's fees and expenses, and such credit shall be the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule provided by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner."

*Hearings Before the Subcommittee on Labor of the Committee on Labor and Human Resources*, 97th Congress, 1st Sess. 12 (1981).

the offset under the 1984 Amendments.<sup>8</sup> Although in *Ochoa*, the Fifth Circuit directed that in every case involving distribution of a longshoreman's tort recovery, the district court should assess the reasonableness of the longshoreman's attorney's fee, it did not set forth a standard. Presumably, the standard developed under the 1972 Act would still apply. That standard is now applied by the undersigned, even though it is not certain that Congress meant to confer upon administrative law judges the authority to address this issue which has always been in the domain of the district judges handling the third party suits.

Claimant submitted that the 40% contingency fee contract between her and her attorney in the third party suit was reasonable and a standard amount throughout the legal profession for a personal injury action.<sup>9</sup> Additionally, claimant explained that due to the consolidation

<sup>8</sup> In *Ochoa*, *supra*, it was held that if no proceeds remain after the out of pocket litigation expenses, attorneys fee, and compensation lien are paid, the court "may make an equitable adjustment of the recovery award between [claimant and his attorney]." 754 F.2d at 1198. This adjustment of the attorneys fee did not increase the offset to employer; claimant was the sole beneficiary. *Id.* See also *Strachan Shipping Co. v. Melvin*, 327 F.2d 83 (5th Cir. 1964); *Scozzari v. Jade Co.*, 350 F.Supp. 801 (E.D.N.Y. 1972).

<sup>9</sup> Claimant did not allege that employer should be precluded from contesting the fees, even though the facts would warrant such a preclusion based on estoppel by acts and declarations, or even based on ratification.

"An 'estoppel by acts and declarations' is such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself." *Black's Law Dictionary* 495 (5th ed. 1979). In this instance, by



of her claim with many others under lead cases, any discovery and investigation done for the lead case applies to all cases in that group. (Claimant's post-trial brief at pp. 9-10; JX-2).<sup>10</sup> It is not possible to discern from the

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not objecting to the fees when accepting the benefits of the first three settlements, which occurred before claimant's husband died, employer induced claimant and her attorney to continue the third party suit after her husband's death under the belief that the 40% contingency fee was acceptable to employer.

Ratification arguably occurred because, even though no principal-agent relationship existed between employer and claimant, employer benefited from claimant's procurement of an attorney to continue the third party suit. Ratification is "[t]he affirmance by a person of a prior act which did not bind him, but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Black's Law Dictionary 1135 (5th ed. 1979). Had claimant abandoned the suit, employer would not have received part of the Raymark settlement nor be entitled to a credit against future benefits.

<sup>10</sup> At the conclusion of the hearing, the parties agreed that employer would obtain and submit a certified copy of the entire court file in the third party suit. Exhibit JX-2 was left open for the admission of this evidence. (Tr. pp. 56-57). Employer subsequently admitted a copy of the *Yates* docket sheet on file with the Clerk of the U.S. District Court for the Southern District of Mississippi. Employer did not submit any copies of the docket sheets of the lead cases under which *Yates* had been consolidated, including *Harris*, *Hart*, and *Chapin*, although this consolidation was made known at the hearing.

Upon knowledge of the incompleteness of Exhibit JX-2, claimant submitted copies of the docket sheets for the *Harris* and *Hart* lead cases on September 20, 1991 and for the *Chapin* case on October 18, 1991. These submissions were made before employer submitted a rebuttal brief on November 1, 1991.

Although claimant's submissions were not made within the time limits listed in 29 C.F.R. §18.55 (1990), they are nevertheless

sheets whether claimant's attorney worked on any of the lead cases, or participated in any of the discovery. (JX-2).

Employer submitted that a minimal amount of work was involved in the third party suit. Although claimant recalled going to federal district court in Mississippi on one occasion, she testified that she never had to give a deposition or a recorded statement. Additionally, there was no hearing or a trial. (Tr. pp. 38-39). Employer argued that since the third party suit was a mass tort litigation allegedly involving little work as evidenced by the *Yates* docket sheet, a 25% contingency fee would be reasonable. However, employer produced no evidence, nor even an allegation, that the 40% contingency fee was greater than that normally and customarily charged by attorneys in this region.<sup>11</sup>

As noted above, district courts have the supervisory power to review and disturb contingency fees contracts based on ethical considerations, and on §33(f) of the Act. Additionally, they have the expertise to readily make a reasonableness determination. Thus, the undersigned finds that the non-disturbance of an attorney fee by the district court is presumptive evidence that the fee was reasonable. As such, the burden then shifts to employer to come forward with substantial evidence, in this proceeding, that the fee was unreasonable.

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admitted due to the misleading nature of employer's statement that he would submit a copy of the *entire* record.

<sup>11</sup> Further, if the attorney fee was patently unreasonable, one could assume that the third party tortfeasors would have raised the issue, as they have an interest in ensuring that the greatest offset is given.

As stated earlier, employer emphasized the lack of evidence that a substantial amount of work was performed in the third party suit. However, a significant difference exists between hourly fees and contingency fees, and the reasonableness of each must be judged with that difference in mind. While the time expended in hourly fee contracts is of the utmost importance in determining the reasonableness of fees under them, it is of less importance in contingency [sic] fee contracts. Thus, employer's evidence on this factor alone is insufficient to find claimant's attorney's fee unreasonable, and it is therefore found that claimant's attorney fee, which is based on a 40% contingency fee contract, is reasonable. As such, the full amount of such fee should be deducted as an expense in determining the net amount of claimant's third party recovery under §33(f) of the Act.

As a final note on the issue, claimant's equal protection argument should be addressed. Claimant argued that §33(f) may be unconstitutional in that it serves to deny claimant equal protection under the law.<sup>12</sup> Claimant

<sup>12</sup> Claimant additionally argued that §28 (attorney fees for services rendered under the Act) may be unconstitutional.

In regards to §28(a) and (b), claimant's argument has no merit as those provisions pertain solely to determining an amount that employer, a nonconsensual party, should be ordered to pay. Due to its humanitarian purpose, the Act provides that employer and/or its carrier is to pay claimant's attorney a reasonable fee, when claimant's action is successful. This is a statutory departure from the American Rule, which mandates that each party is liable for its own attorney fees.

Section 28(c) addresses the possibility of claimant being held to pay a portion of or all of his attorney fees. Thus, the Act recognizes that claimant's attorney may not limited [sic] to the

submitted that the Act does not provide for review of the fees charged to employer by its own attorney.

All attorneys are held to the ethical rules binding in their respective states. The ABA Code of Professional Responsibility states that a "lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." *Id.*, DR 2-106(A). The ABA Code of Judicial Conduct provides that a "judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." *Id.*, Canon 3, subd. B(3). *See also* cases cited under footnote 6, *supra*. While §33(f) may provide employer with a convenient ground to raise the issue of claimant's attorney's fees, the fact remains that

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fee he receives under §28(a) or (b), depending on the circumstances of the case. Cases decided before the 1984 Amendments show that claimant himself may be liable for fees incurred prior to employer's notification and refusal to pay, as well as prior to a controversy arising. *See Portland Stevedoring Co. v. Director, OWCP*, 552 F.2d 293, 6 BRBS 61 (9th Cir. 1977); *Jones v. The Chesapeake & Potomac Telephone Co.*, 11 BRBS 7 (1979); *Trachsel v. Brady-Hamilton Stevedore Co.*, 15 BRBS 469 (1983). To the extent that the 1984 Amendments, particularly §28(e), eliminate this possibility, claimant's argument may have merit.

It should also be noted that, to the extent that awards of attorney fees under the Act determine what claimant's attorney can reasonably charge for his services, claimant's attorney cannot seek from his client the difference between his contractual rate and a lower rate awarded by the agency. ABA Code of Prof. Resp., DR 2-106(A). DR 2-106(B) provides the standard from which a reasonable fee is determined. If a court awards a lesser fee than that requested, an attorney may have grounds for appeal if that court did not consider all the factors in DR 2-106(B).



the practice of all attorneys is subject to scrutiny. In return for a license to practice from a state, and admission by courts to practice before them, an attorney waives many of the privacy and contractual rights that other members of society continue to enjoy. If claimant is aware that employer's attorney is charging an excessive fee, he can bring that to the attention of the judge. Claimant does not need a provision in the Longshore Act in order to do so.

**Does employer's lien and/or credit for net third party partial settlements extend to net amounts received by non-dependent heirs-at-law of decedent?**

Employer has argued that claimant is not entitled to an apportionment of the post-death third party settlements under operation of law. Employer submitted that the purpose of §33 of the Act is to place the ultimate liability for injury on the third party entity, who ultimately caused the claimant's harm and, thereby, protect the employer, who is subject to absolute liability under the Act. Employer continued that a recognized apportionment between claimant and her children would be contrary to both of these themes, and would thereby, discourage settlements under the Act. Additionally, employer alleged that claimant is attempting to get her third party settlement and keep it, thereby not making the employer whole, and that she would be receiving a double recovery.

Employer's argument is rejected, as federal and state law provides for the apportionment of the suit between claimant and the six children. Claimant's third party wrongful death suit was brought in federal court based

on diversity of citizenship. *Erie Railroad v. Thompson*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny, require that the federal district court apply the state law in which it sits. Mississippi's wrongful death statute provides that "[d]amages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children, all shall go to his wife." Miss. Code Ann. §11-7-13 (1972). Claimant testified that she has six children and that each one of them received one-seventh ( $1/7$ ) of each settlement as required by Mississippi law. (Tr. pp. 27-28).

Employer's argument that claimant is attempting to obtain a double recovery under the Act presupposes that those shares declared by Mississippi law to be the property of the children of the deceased actually go to claimant. Further, the evidence in this record shows that only one-seventh ( $1/7$ ) of each settlement went directly to claimant. (CX-1; Tr. pp. 27-28). Whether or not any of her children gave claimant their share is immaterial. Such a gift is not a sum claimant herself recovered under the third party action.

Unlike the situations in *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35, 40-41 (1990), *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46, 58 (1990), *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1, 3-4 (1989), and *Lustig v. United States Department of Labor*, 881 F.2d 593 (9th Cir. 1989), the settlement here is clearly apportioned between the appropriate parties, and claimant has made no claim concerning apportionment according to the types of damages she received, such as loss of consortium. No speculation is involved in either determining claimant's share or the amount of the offset.

Nevertheless, employer's argument that the terms of the settlement agreements entitle it to offset the total amounts of the settlements is meritorious. The settlement with Raymark Industries, Inc., dated June 9, 1987, which claimant signed on that date, states in pertinent part that:

Releasors do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including but not being limited to the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to *any Releasor* shall first be given *credit for the consideration paid to Releasors* under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to *any Releasor* until the *consideration paid to Releasors* under this agreement is exhausted.

(RX-21 at p.5).<sup>13</sup>

<sup>13</sup> Although an acknowledgement signed by claimant on April 27, 1988 varies from the above in that claimant acknowledges only that employer would "be given credit for the amount of money paid to [her] by [Raymark], and that [employer would owe her] no Workmen's Compensation benefits or medical benefits . . . until the amount received by [her] from the above mentioned Defendant has been exhausted based on the weekly benefits due [her from employer]. . . ." (RX-21 at p. 17), such an acknowledgement cannot vary the terms of the settlement which claimant had previously signed.

The Wellington "Final Judgment Approving Settlement and Dismissing with Prejudice", dated April 12, 1989, states that:

The Court finds that the above offer of settlement is reasonable and in the best interest of said parties, and it is therefore, approved, provided that if any claim be pending or hereafter filed by the plaintiff, the decedent's heirs, or anyone in privity with them for benefits under the Mississippi Workers' Compensation Act, the Federal Longshoremen's and Harbor Workers' Compensation Act, or any other law which provides benefits to be paid by the decedent's employer, and/or insurance carrier, and any such employer and/or insurance carrier be ordered to pay such benefits resulting from or in any way related to any matter, fact, or thing appearing in the Complaint filed in this cause, then under the provisions of the applicable compensation act such employer and/or its insurance carrier shall first be given *credit for the net amount of the aforesaid sum accruing to the plaintiff and the decedent's heirs.*

(RX-21 at pp. 20-21; *see also* RX-21 at pp. 22-23). The settlement itself, dated April 5, 1989, uses the same language as in the Raymark settlement. (RX-21 at pp. 31-32).

The Manville Corporation settlement, dated March 3, 1989, incorporated strikingly different language. It states that:

The undersigned further agree to be responsible for the required reimbursement of all outstanding medical bills and/or worker compensation benefits paid to or on behalf of the undersigned to date, and shall indemnify



and hold harmless the TRUST up to the amount of this settlement for any such sums adjudicated to be a lien upon this settlement.

(RX-21 at p. 46). However, in another part of the settlement, it uses a clause similar to that in Raymark, which gives employer credit for the entire amount of the net proceeds. (RX-21 at pp. 47-48).

Thus, with respect to all three post-death settlements entered into by claimant and the surviving children of the decedent, it is found that claimant is contractually obligated to give employer credit for the entire amount of the net proceeds, and not only the one-seventh she received. While humanitarian principles may deem such clauses unconscionable and void as between employer and claimant,<sup>14</sup> as claimant did not receive the entire settlement monies, and ostensibly she may need compensation benefits to survive this contractual obligation is recognized in view of the holding in *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987).

<sup>14</sup> As between claimant and the third party tortfeasors, these clauses are unquestionably valid and enforceable. Claimant agreed to the credit in exchange for the settlement monies. The settlement monies may have been considerably less had she not agreed to have her children's shares credited. However, the third party tortfeasors' only interest in the insertion of those clauses in the settlements was to ensure them as much credit as possible should employer sue them. Since employer's right against those tortfeasors is now prescribed, an argument could be made that the clauses are thus inapplicable.

### Funeral Expenses

An itemized certification shows that claimant and her family spent \$2,445.00 on funeral expenses. (RX-17 at p. 3). Section 9(a) provides that employer is liable for reasonable funeral expenses up to \$3,000.00. As employer has not contested the reasonableness of these expenses, and as nothing in the itemized certification appears unreasonable, claimant is entitled to be reimbursed for the full amount of \$2,445.00.

### Attorneys Fees

Claimant's attorney is entitled to an award of attorney fees for his representation of this claim, despite his recovery of attorney fees under the third party settlements. *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 423-424, 12 BRBS 338 (5th Cir. 1980). Additionally, although it is unlikely that employer will ever have to pay claimant any amount under the death benefit due to the large offset, her attorney is still entitled to an award. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990); *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1984).

Based on the foregoing findings and conclusions, the undersigned issues the following order.

### ORDER

1. Employer and its carrier shall reimburse claimant \$2445.00 for funeral expenses.

2. Employer and its carrier shall pay claimant death benefits in accordance with Section 9(b) of the Act commencing January 28, 1986 and continuing based on an average weekly wage of \$228.12.

3. Employer and its carrier shall pay interest in accordance with 28 U.S.C. §1961 on all past due benefits.

4. Employer and its carrier shall receive credit pursuant to §33(f) for the net amount recovered by claimant and her six children from the settlements with the third parties which were approved by the carrier on September 16, 1987, March 4, 1988, and May 16, 1989 on LS-33 forms filed in the office of the District Director.

5. Counsel for claimant, within 20 days of the receipt of this order, shall serve and file a fully supported fee application. Opposing counsel is granted 20 days thereafter to respond with objections thereto.

Dated: April 2, 1992

Metairie, Louisiana

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Section 33(f) and 33(g) of the LHWCA provide as follows in pertinent part:

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees.)

33 U.S.C. § 933(f)

(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under § (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative.) The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within 30 days after the settlement is entered into. (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlements obtained from or judgment rendered



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against a third person, all rights to compensation and medical benefits under this act shall be terminated, regardless of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this Act.

33 U.S.C. § 933(g)

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**Renate CRETAN, Widow of John Cretan;  
Nicole Cretan, Daughter of John Cretan, Petitioners-Cross-Respondents,**

**v.**

**BETHLEHEM STEEL CORPORATION,  
Respondent-Cross-Petitioner,**

**and**

**Director, Office of Workers Compensation Programs, Respondent.**

**Nos. 90-70589, 90-70634.**

**United States Court of Appeals,  
Ninth Circuit.**

**Argued and Submitted May 14, 1993.**

**Decided July 28, 1993.**

**Victoria Edises, Kazan, McClain, Edises & Simon,  
Oakland, CA, for petitioners-cross-respondents.**

**Joshua T. Gillelan, U.S. Dept. of Labor, Office of the Sol., Washington, DC, for the respondent; Bill Parrish, San Francisco, CA, Robert E. Babcock, Littler, Mendelson, Fastiff & Tichy, Portland, OR, for respondent-cross-petitioner.**

**Petition for Review of an Order of the Benefits Review Board.**

Before: BROWNING, CHOY, and CANBY, Circuit Judges.

CANBY, Circuit Judge.

We have before us a survivors' petition and an employer's cross-petition for review of a Benefits Review Board decision and order that resolved the survivors' claim for disability compensation and death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950. We have jurisdiction under 33 U.S.C. § 921(c). We affirm in part and reverse in part.

### BACKGROUND

In 1942 and 1943, Bethlehem Steel Corporation (Bethlehem) employed John Cretan as an electrician engaged in the repair and construction of ships. John was exposed to asbestos on the job. Bethlehem was John's only maritime employer.

In January 1984, John learned he suffered from mesothelioma, a terminal asbestos-related disease. He died in February 1985. Before he died, John filed a timely claim for compensation and medical benefits under the Act. Bethlehem disputed liability. Two months after John's death his wife Renate and daughter Nicole claimed disability compensation as his survivors and death benefits in their own right. Bethlehem disputed those claims too.

Prior to his death, John had also brought a product liability action against a number of asbestos manufacturers. He settled his third-party claims in a series of agreements. Although neither Renate nor Nicole were

parties to John's action, each settled her potential claims for his wrongful death against the manufacturers at that time. Renate also settled, in the same series of agreements, an action which she had filed seeking recovery for loss of consortium. The net proceeds from the settlements were approximately \$333,489. One asbestos manufacturer also bought a \$50,000 annuity on behalf of the family.

An administrative law judge (ALJ) tried the Cretans' LHWCA claims after John's death. The ALJ awarded disability compensation and medical benefits to Renate as John's widow. Renate and Nicole also received death benefit awards. The ALJ rejected Bethlehem's argument that section 33(g) of the Act, 33 U.S.C. § 933(g), had terminated Bethlehem's liability to the Cretans because the family had failed to secure Bethlehem's written approval of the third-party settlements. The ALJ, however, permitted Bethlehem to offset a portion of the settlements against its statutory liability. Renate and Nicole had argued without success that the offset provision contained in section 33(f) of the Act, 33 U.S.C. § 933(f), was inapplicable to them.

The Cretans and Bethlehem each appealed to the Board. In addition to resolving other objections to the ALJ's ruling, the Board agreed that section 33(g) was no bar to the LHWCA claims. The Board also agreed that Bethlehem was entitled to credit under section 33(f). The Board concluded, however, that Bethlehem was entitled to a credit in the amount of the family's aggregate net tort recovery. We review the Board's decision for "errors of law and adherence to the substantial evidence standard," *Port of Portland v. Director, Office of Workers' Compensation Programs*, 932 F.2d 836, 838 (9th Cir.1991), and we may



affirm on any basis contained in the record. *National Steel & Shipbuilding Co. v. United States Dep't of Labor, Office of Workers' Compensation Programs*, 606 F.2d 875, 883 n. 4 (9th Cir.1979).

### DISCUSSION

The Cretans and Bethlehem each raise several challenges to the Board's ruling. The dispositive questions, however, are whether Renate and Nicole were subject to sections 33(f) and (g). We conclude that they were, and that they consequently cannot recover under the LHWCA.

Section 33 of the LHWCA establishes a claimant's right to seek recovery from third parties without fear of being categorically denied compensation or benefits under the Act. This right, however, is qualified by subsections (f) and (g), which complement each other in important respects. Section 33(f) provides:

*If the person entitled to compensation institutes proceedings . . . the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against [a] third person.*

33 U.S.C. § 933(f) (1988) (emphasis added). The import of this provision as a guard against double recovery is clear enough: the employer is entitled to set off against its liability any recovery that the person entitled to compensation received from third parties.

Subsection (g) provides in relevant part:

*If the person entitled to compensation . . . enters into a settlement with a third person . . . for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed. . . .*

33 U.S.C. § 933(g)(1). The purpose of this provision is to protect the employer against the employee's entering an inordinately low settlement, which would deprive the employer of a proper set-off under section 33(f).

As a result of the interplay of sections 33(f) and 33(g), the Cretans will necessarily be precluded from any compensation recovery if they fall within the reach of both subsections.<sup>1</sup> They do not dispute that they failed to obtain the written consent of Bethlehem to the settlement. As a result, if their third-party recovery was less than they are entitled to under LHWCA, section 33(g) precludes any LHWCA recovery from Bethlehem. On the other hand, if their third-party recovery exceeded their entitlement under LHWCA, Bethlehem would be entitled to a 100% set-off under section 33(f).

The Cretans contend, however, that they do not fall within the scope of either subsection because both expressly apply only to persons "entitled to compensation." They argue that they were not persons "entitled to compensation" when they settled their tort claims

<sup>1</sup> The Cretans conceded this proposition at oral argument.

because John had not yet died. Our resolution of this issue is complicated by the fact that in the past the Director has given the term "person entitled to compensation" different meanings in sections 33(f) and 33(g), and each meaning has changed over time.

With regard to section 33(f), the Cretans urge that the fact that they were not "entitled to compensation" at the time of the recovery precludes Bethlehem from taking any set-off. The ALJ and the Board each rejected that argument, and later we adopted the Board's position in another appeal. See *Force v. Director, Office of Workers' Compensation Programs*, 938 F.2d 981, 984-985 (9th Cir.1991). In *Force*, we deferred to the Director's view at that time that a claimant's status as a "person entitled to compensation" need not be fixed at any particular moment. Even though the entitlement to compensation arose after the settlement, it did eventually arise and the employer was entitled to its set-off. *Id.*

The Cretans argue, however, that *Force* is implicitly overruled by the Supreme Court's recent decision in *Estate of Cowart v. Nicklos Drilling Co.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992). We disagree.

*Cowart* arose under section 33(g). There the claimant had been informed that he was entitled to benefits under the LHWCA, but no order had been entered and no payments had been made by the employer. *Id.* at \_\_\_, 112 S.Ct. at 2592. At that point, the claimant entered into a settlement, lower than his potential LHWCA benefits, with a third party. See *Id.* He did not obtain the prior written consent of his employer. *Id.* Before *Cowart* reached the Supreme Court, it had been the Director's

position that a claimant who had not yet received a compensation order and had received no payments was not a "person entitled to compensation" for purposes of section 33(g). *Id.* at \_\_\_, 112 S.Ct. at 2593-94. The Director reversed his position in the Supreme Court, *Id.* at \_\_\_, 112 S.Ct. at 2594, and the Court adopted the new position. The Court held that the term "person entitled to compensation" in section 33(g) was not limited to persons who had either obtained a compensation order or had received benefits. "Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated." *Id.* at \_\_\_, 112 S.Ct. at 2595. Accordingly, section 33(g) applied and the claimant was barred from recovering LHWCA benefits from his employer.

It is clear that the holding of *Cowart* does not dictate the outcome of our case. It does not rule on the question whether a claimant whose entitlement will mature upon a death that has not yet occurred is a "person entitled to compensation." *Cowart* does, however, contain language that in isolation appears to support the Cretans. In rejecting the view that *Cowart* did not become "entitled" until he obtained an order or a payment, the Court stated: "He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.* at \_\_\_, 112 S.Ct. at 2595. The Court also stated that the normal meaning of entitlement is that "the person satisfies the prerequisites attached to the right." *Id.* The Cretans seize upon this language, and argue that their entitlement to compensation under the Act vested when



John died. There is no reason, however, to assume that the Supreme Court had the present situation in mind when it uttered these dicta. The Court's point was that an entitlement did not have to be reduced to order or payment to be an entitlement. The Cretans give the vesting language a reading which is separated from the facts to which it is addressed. We decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended. See *United States v. Ordonez*, 737 F.2d 793, 803 n. 1 (9th Cir.1984) (discussing uses of dictum).

The Supreme Court's interpretation of section 33(g) in *Cowart* served the purposes of that subsection to " 'protect[ ] the employer against his employee's accepting too little for his cause of action against a third party.' " *Cowart*, \_\_\_ U.S. at \_\_\_, 112 S.Ct. at 2598 (quoting *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467, 88 S.Ct. 1140, 1145, 20 L.Ed.2d 30 (1968)). The construction urged by the Cretans, if applied to section 33(g), would defeat that purpose. If applied to section 33(f), the same construction would defeat the purpose of that subsection to protect the employer against double recovery. In light of the purposes of section 33(f), there is little sense in a distinction that turns on whether the death for which settlement is made has yet to occur. That consideration leads us to adhere to our ruling in *Force* that claimants who settle before the death that gives rise to LHWCA benefits are subject to the section 33(f) set-off; the entitlement does not have to have become vested at the time the settlement is made. " 'The only relevant question is whether the claimant is impermissibly recovering twice for the same

injury, regardless of when such payments occur.' " *Force*, 938 F.2d at 984 (quoting Director's brief).

It is true that in *Force*, we deferred to the Director's interpretation of section 33(f), and that the Director now has changed positions and urges the same result as do the Cretans. For reasons already largely stated, we find the Director's new interpretation unreasonable. See *Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir.1988) (en banc) (substituting revised agency interpretation for an adverse precedent unnecessary if the substitution is unreasonable or inconsistent with the statute). If we were to adopt the Director's new view, relatives of claimants who are certain to die could negotiate settlements before the claimant's death and defeat the employer's offset. Furthermore, if the new view is extended to section 33(g), third-party tortfeasors could benefit from offering to desperate families inordinately small settlements the deficiencies of which the employer would have to make up. Those results would contradict the policy of employer protection that is evident on the face of sections 33(f) and (g). See *Cowart*, \_\_\_ U.S. at \_\_\_, 112 S.Ct. at 2598.

On one point, we do agree with the Cretans and the Director regarding the effect of *Cowart*. The term "person entitled to compensation" must receive the same construction in sections 33(f) and 33(g), in accord with "the basic canon of statutory construction that identical terms within an Act bear the same meaning." *Cowart*, \_\_\_ U.S. at \_\_\_, 112 S.Ct. at 2596. Indeed, one of the reasons that the Supreme Court rejected the narrow interpretation of "entitled" urged by *Cowart* was that it made no sense

when applied equally to section 33(f). *Id.* Thus, in accordance with our ruling regarding section 33(f), we hold that the Cretans are persons "entitled to compensation" within the meaning of section 33(g). As we earlier explained, this holding, when combined with our ruling on section 33(f), defeats recovery for the Cretans under LHWCA: if their tort settlement was less than their statutory entitlement, they are barred by section 33(g); if the recovery exceeded their statutory entitlement, Bethlehem is entitled to set off its entire statutory liability under section 33(f).

### CONCLUSION

Because Renate and Nicole Cretan were persons "entitled to compensation," they were subject to the provisions of sections 33(f) and (g) of the LHWCA when they settled their tort claims with third parties. Together, the two provisions act as a complete bar to recovery from Bethlehem. Accordingly, we need not consider the petitioners' and cross-petitioner's other arguments.

That portion of the Board's decision that allows Bethlehem a total set-off of its liabilities pursuant to section 33(f) is affirmed. That part of the Board's decision holding the Cretans not to be subject to section 33(g) is reversed. The matter is remanded to the Board.

**AFFIRMED IN PART; REVERSED IN PART;  
REMANDED.** Costs in favor of Bethlehem.

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ESTATE OF FLOYD COWART, Petitioner

v

NICKLOS DRILLING COMPANY et al.

505 US \_\_\_, 120 L Ed 2d 379, 112 S Ct 2589

[No. 91-17]

Argued March 25, 1992. Decided June 22, 1992.

**Decision:** Forfeiture provision of Longshore and Harbor Workers' Compensation Act (33 USCS § 933(g)) held to apply where worker not then receiving or awarded compensation from employer settles third-party claim.

### APPEARANCES OF COUNSEL

Lloyd N. Frischhertz argued the cause for petitioner.

Michael R. Dreeben argued the cause for federal respondent.

H. Lee Lewis, Jr. argued the cause for private respondents.

Justice Kennedy delivered the opinion of the Court.

The Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.], creates a comprehensive federal scheme to compensate workers injured or killed while employed upon the navigable waters of the United States. The Act allows injured workers, without forgoing compensation under the Act, to pursue claims against third parties for their injuries. But § 33(g) of the LHWCA, 33 USC § 933(g) [33 USCS § 933(g)], provides that under certain circumstances if a third-party claim is settled



without the written approval of the worker's employer, all future benefits including medical benefits are forfeited. The question we must decide today is whether the forfeiture provision applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the Act.

## I

The injured worker in this case was Floyd Cowart, and his estate is now the petitioner. Cowart suffered an injury to his hand on July 20, 1983, while working on an oil drilling platform owned by Transco Exploration Company (Transco). The platform was located on the Outer Continental Shelf, an area subject to the Act. 43 USC § 1333(b) [43 USCS § 1333(b)]. Cowart was an employee of the Nicklos Drilling Company (Nicklos), who along with its insurer Compass Insurance Co. (Compass) are respondents before us. Nicklos and Compass paid Cowart temporary disability payments for 10 months following his injury. At that point Cowart's treating physician released him to return to work, though he found Cowart had a 40% permanent partial disability. App. 75. The Department of Labor notified Compass that Cowart was owed permanent disability payments in the total amount of \$35,592.77, plus penalties and interest. This was an informal notice which did not constitute an award. No payments were made.

Cowart, meanwhile, had filed an action against Transco alleging that Transco's negligence caused his injury. On July 1, 1985, Cowart settled the action for

\$45,000, of which he received \$29,350.60 after attorney's fees and expenses. Nicklos funded the entire settlement under an indemnification agreement with Transco, and it had prior notice of the settlement amount. But Cowart made a mistake: he did not secure from Nicklos a formal, prior, written approval of the Transco settlement.

After settling, Cowart filed an administrative claim with the Department of Labor seeking disability payments from Nicklos. Nicklos denied liability on the grounds that under the terms of § 33(g)(2) of the LHWCA, Cowart had forfeited his benefits by failing to secure approval from Nicklos and Compass of his settlement with Transco, in the manner required by § 33(g)(1).

Section 33(g) provides in pertinent part:

"(g) Compromise obtained by person entitled to compensation

"(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

"(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." 33 USC § 933(g) [33 USCS § 933(g)].

The Administrative Law Judge rejected Nicklos' argument on the basis of prior interpretations of § 33(g) by the Benefits Review Board (Board or BRB). In the first of those decisions, *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd* mem., 622 F2d 595 (CA9 1980), the Board held that in an earlier version of § 33(g) the words "person entitled to compensation" referred only to injured employees whose employers were making compensation payments, whether voluntary or pursuant to an award. The *O'Leary* decision held that a person not yet receiving benefits was not a "person entitled to compensation," even though the person had a valid claim for benefits.

The statute was amended to its present form, the form we have quoted, in 1984. In that year Congress redesignated then subsection (g) to what is now (g)(1) and modified its language somewhat, but did not change the phrase "person entitled to compensation." Congress also added the current subsection (g)(2), as well as other provisions. Following the 1984 amendments the Board decided *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), *app. dism'd* 826 F2d 1011 (CA11 1987). The Board

reaffirmed its interpretation in *O'Leary* of the phrase "person entitled to compensation," saying that because the 1984 amendments had not changed the specific language, Congress was presumed to have adopted the Board's previous interpretation. It noted that nothing in the 1984 legislative history disclosed an intent to overrule the Board's interpretations. The Board decided that the forfeiture provisions of subsection (g)(2), including the final phrase providing that forfeiture occurs "regardless of whether the employer . . . has made payments or acknowledged entitlement to benefits," was a "separate provisio[n] applicable to separate situations." 18 BRBS, at 29.

The ALJ in this case held that under the reasoning of *O'Leary* and *Dorsey*, Cowart was not a person entitled to compensation because he was not receiving payments at the time of the Transco settlement. Thus, the written-approval provision did not apply and Cowart was entitled to benefits. Cowart's total disability award was for \$35,592.77, less Cowart's net recovery from Transco of \$29,350.60, for a net award of \$6242.17. In addition, Cowart was awarded interest, attorney's fees, and future medical benefits, the last constituting, we think, a matter of great potential consequence. The Board affirmed in reliance on *Dorsey*. 23 BRBS 42 (1989) (*per curiam*).

On review, a panel of the Court of Appeals for the Fifth Circuit reversed. 907 F2d 1552 (1990). Without addressing the Board's specific statutory interpretation, it held that § 33(g) contains no exceptions to its written-approval requirement. Because this holding, and a decision by a panel in a different case, *Petroleum Helicopters, Inc. v. Barger*, 910 F2d 276 (CA5 1990), conflicted with a



previous unpublished decision in the same Circuit, *Kahny v. O.W.C.P.*, 729 F2d 777 (CA5 1984), the Court of Appeals granted rehearing en banc. The Director of the Office of Workers' Compensation Programs (OWCP), a part of the Department of Labor, 20 CFR § 701.201 (1991), appeared as a respondent before the full Court of Appeals to defend the interpretation and decision of the Board.

In a per curiam opinion, the en banc Court of Appeals confirmed the panel's decision reversing the BRB in its Cowart case. 927 F2d 828 (CA5 1991). The Court of Appeals' majority held that § 33(g) is unambiguous in providing for forfeiture whenever an LHWCA claimant fails to get written approval from his employer of a third-party settlement. The majority acknowledged the well-established principle requiring judicial deference to reasonable interpretations by an agency of the statute it administers, but concluded that the plain language of § 33(g) leaves no room for interpretation. Judge Politz, joined by Judges King and Johnson, dissented on the ground that the OWCP's was a reasonable agency interpretation of the phrase "person entitled to compensation," to which the Court of Appeals should have deferred.

We granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of Appeals' decision. 502 U.S. \_\_\_, 116 L Ed 2d 653, 112 S Ct 635, 116 L Ed 2d 653 (1991). We now affirm.

## II

In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. *Demarest v. Manspeaker*, 498 U.S. \_\_\_, 112 L Ed 2d 608, 111 S Ct 599 (1991). The question is whether Cowart, at the time of the Transco settlement, was a "person entitled to compensation" under the terms of § 33(g)(1) of the LHWCA. Cowart concedes that he did not comply with the written-approval requirements of the statute, while Nicklos and Compass do not claim that they lacked notice of the Transco settlement. By the terms of § 33(g)(2), Cowart would have forfeited his LHWCA benefits if, and only if, he was subject to the written-approval provisions of § 33(g)(1). Cowart claims that he is not subject to the approval requirement because in his view the phrase "person entitled to compensation," as long interpreted by both the BRB and the OWCP, limits the reach of § 33(g)(1) to injured workers who are either already receiving compensation payments from their employer, or in whose favor an award of compensation has been entered. Nicklos and Compass, supported by the United States, defend the holding of the Court of Appeals that § 33(g) cannot support that reading. We agree with these respondents and hold that under the plain language of § 33(g), Cowart forfeited his right to further LHWCA benefits by failing to obtain the written approval of Nicklos and Compass prior to settling with Transco.

The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the

clear meaning of statutes as written. The principle can at times come into some tension with another fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L Ed 2d 694, 104 S Ct 2778 (1984); *National R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. \_\_\_, 118 L Ed 2d 52, 112 S Ct 1394 (1992). Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms. *K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 100 L Ed 2d 313, 108 S Ct 1811 (1988); *Chevron*, *supra*, at 842-843, 81 L Ed 2d 694, 104 S Ct 2778. In any event, we need not resolve any tension of that sort here, because the Director of the OWCP and the Department of Labor have altered their position regarding the best interpretation of § 33(g). The Director appears as a respondent before us, arguing in favor of the Court of Appeals' statutory interpretation, and contrary to his previous position. See Brief for Federal Respondent 8, n. 6. If the Director asked us to defer to his *new* statutory interpretation, this case might present a difficult question regarding whether and under what circumstances deference is due to an interpretation formulated during litigation. See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213, 102 L Ed 2d 493, 109 S Ct 468 (1988); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. \_\_\_, 113 L Ed 2d 117, 111 S Ct 1171 (1991). The agency does not ask this, however. Instead, the federal respondent argues that the Court of Appeals was correct in saying the language § 33(g) is plain and cannot support the interpretation

given it by the Board. Because we agree with the federal respondent and the Court of Appeals, and because Cowart concedes that the position of the BRB is not entitled to any special deference, see Brief for Petitioner 25; see also *Potomac Electric Power Co. v. Director, Office of Worker's Compensation Programs*, 449 U.S. 268, 278, n. 18, 66 L Ed 2d 446, 101 S Ct 509 (1980); *Martin v. Occupational Safety and Health Review Comm'n*, *supra*, we need not resolve the difficult issues regarding deference which would be lurking in other circumstances.

As a preliminary matter, the natural reading of the statute supports the Court of Appeals' conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor. Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right. See generally *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 33 L Ed 2d 548, 92 S Ct 2701 (1972) (discussing property interests protected by the Due Process Clause and contrasting an entitlement to an expectancy); *Black's Law Dictionary* 532 (6th ed. 1990) (defining "entitle" as "To qualify for; to furnish with proper grounds for seeking or claiming"). Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen.



If the language of § 33(g)(1), in isolation, left any doubt, the structure of the statute would remove all ambiguity. First, and perhaps most important, when Congress amended § 33(g) in 1984, it added the explicit forfeiture features of § 33(g)(2), which specify that forfeiture occurs "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." We read that phrase to modify the entirety of subsection (g)(2), including the beginning part discussing the written-approval requirement of paragraph (1). The BRB did not find this amendment controlling because the quoted language is not an explicit modification of subsection (1). This is a strained reading of what Congress intended. Subsection (g)(2) leaves little doubt that the contemplated forfeiture will occur whether or not the employer has made payments or acknowledged liability.

The addition of subsection (g)(2) in 1984 also precludes the primary argument made by the BRB in favor of its decisions in *Dorsey* and this case, and repeated by Cowart to us: That Congress in 1984, by reenacting the phrase "person entitled to compensation," adopted the Board's reading of that language in *O'Leary*. The argument might have had some force if § 33(g) had been reenacted without changes, but that was not the case. In 1984 Congress did more than reenact § 33(g); it added new provisions and new language which on their face appear to have the specific purpose of overruling the prior administrative interpretation. In light of the clear import of § 33(g)(2), the Board erred in relying on the purported lack of legislative history showing an explicit

intent to reject the *O'Leary* decision. Even were it relevant, the Board's reading of the legislative history is suspect because as the federal respondent demonstrates, the legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn *O'Leary*. See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess.* 209, 210-211, 396 (1981). In any event, administrative interpretation followed by congressional reenactment cannot overcome the plain language of a statute. *Demarest v. Manspeaker*, 498 U.S., at \_\_\_, 112 L Ed 2d 608, 111 S Ct 599. And the language of § 33(g) is plain.

Our interpretation of § 33(g) is reinforced by the fact that the phrase "person entitled to compensation" appears elsewhere in the statute in contexts in which it cannot bear the meaning placed on it by Cowart. For example, § 14(h) of the LHWCA, 33 USC § 914(h) [33 USCS § 914(h)], requires an official to conduct an investigation upon the request of a person entitled to compensation when, *inter alia*, the claim is controverted and payments are not being made. For that provision, the interpretation championed by Cowart would be nonsensical. Another difficulty would be presented for the provision preceding § 33(g), § 33(f). It mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from a third party. Under Cowart's reading, the reduction would not be available to employers who had not yet begun payment at the time of the third-party recovery. That result makes no sense under the LHWCA structure. Indeed,

when a litigant before the BRB made this argument, the Board rejected it, acknowledging in so doing that it had adopted differing interpretations of the identical language in sections 33(f) and 33(g). *Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1, 4-5 (1989). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. *Sullivan v. Stroop*, 496 U.S. 478, 484, 110 L Ed 2d 438, 110 S Ct 2499 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860, 89 L Ed 2d 855, 106 S Ct 1600 (1986). The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same. And we owe no deference to the BRB, see *supra*, at \_\_\_, 120 L Ed 2d at \_\_\_.

Yet another reason why we are not convinced by the Board's position is that the Board's interpretation of "person entitled to compensation" has not been altogether consistent; and Cowart's interpretation may not be the same as the Board's in precise respects. At times the Board has said this language refers to an employee whose "employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement." *Dorsey*, 18 BRBS, at 28; 23 BRBS, at 44 (case below). At other times, sometimes within the same opinion, the Board has spoken in terms of the employer either making payments or acknowledging liability. *O'Leary*, 7 BRBS, at 147-149; *Dorsey*, 18 BRBS, at 29; see also *In re Wilson*, 17 BRBS 471, 480 (ALJ 1985). Cowart, on the other hand, would include within the phrase both employees receiving compensation benefits and employees who have a judicial award of compensation but are not receiving benefits. Brief for Petitioner 6.

This distinction is an important part of Cowart's response to the position of the United States. Reply Brief for Petitioner 8. It may be that the gap between the Board's and Cowart's positions can be explained by the Board's inconsistency; but that in itself weakens any argument that the Board's interpretation is entitled to some weight.

We do not believe that Congress' use of the word "employee" in subsection (g)(2), rather than the phrase "person entitled to compensation," undercuts our reading of the statute. The plain meaning of subsection (g)(1) cannot be altered by the use of a somewhat different term in another part of the statute. Subsection (g)(2) does not purport to speak to the question of who is required under subsection (g)(1) to obtain prior written approval.

Cowart's strongest argument to the Court of Appeals was that any ambiguity in the statute favors him because of the deference due the OWCP Director's statutory construction, a deference which Nicklos and Compass concede is appropriate. Brief for Respondents 7. As we have said, we are not faced with this difficult issue because the views of the Director, OWCP, have changed since we granted certiorari. *Supra*, at \_\_\_, 120 L Ed 2d at \_\_\_. It seems apparent to us that it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself. It is noteworthy, moreover, that even prior to this case the position of the Department of Labor has not been altogether consistent. It is true that the Director has twice, albeit in a somewhat equivocal manner, endorsed the Board's rulings in *O'Leary* and *Dorsey*. First, in a 1986 circular discussing the Board's *Dorsey* case a subordinate of the Director stated: "While the Board's position may not be totally



consistent with the amended language of Section 33(g), we think it is a rational approach and have advised the Associate Solicitor that we will support this position." United States Dept. of Labor, LHWCA Circular No. 86-3, p. 1 (May 30, 1986). Next, in a Manual published in 1989 the Director again adopted the Board's position that written approval of a settlement is required only from employers who are paying compensation; but the statement ends with a qualifying comment, that "[t]he issue of consent to a settlement can be a complex matter. Judicial interpretation may be necessary to resolve the issue. (See LHWCA CIRCULAR 86-03, 5-30-86)." United States Dept. of Labor, Longshore and Harbor Workers' Compensation Act (LHWCA) Procedure Manual, ch. 3-600, ¶ 9 (Sept. 1989). On the other hand, the Department of Labor has issued regulations (effective in their current form since 1986) which are explicit that the written-approval requirement of § 33(g) applies to a settlement for less than the amount of compensation due under the LHWCA, "regardless of whether the employer or carrier has made payments of [sic] acknowledged entitlement to benefits under the Act." 20 CFR § 702.281(b) (1991). So the Department of Labor has not been speaking with one voice on this issue. This further diminishes the persuasive power of the Director's earlier decision to endorse the BRB's questionable interpretation, a decision he has since reconsidered.

The history of the Department of Labor regulation goes far toward confirming our view of the significance of the 1984 amendments. The original § 702.281, proposed in 1976 and enacted in final form in 1977, required only

that an employee notify his employer and the Department of any third-party claim, settlement, or judgment. 41 Fed.Reg. 34297 (1976); 42 Fed.Reg. 45303 (1977). The sole reference to the forfeiture provisions was a closing parenthetical: "Caution: See 33 USC § 933(g) [33 USCS § 933(g)]." In 1985, in response to the 1984 congressional amendments, the Department proposed to amend § 702.281 by replacing the closing parenthetical with a subsection (b), stating that failure to obtain written approval of settlements for amounts less than the compensation due under the Act would lead to forfeiture of future benefits. 50 Fed.Reg. 400 (1985). In response to comments, the final rulemaking modified § 702.281(b) to clarify that the forfeiture provision applied regardless of whether the employer was paying compensation. 51 Fed.Reg. 4284-4285 (1986). Thus the evolution of § 702.281 suggests that at least some elements within the Department of Labor read the 1984 statutory amendments to adopt a rule different from the Board's previous decisions.

We also reject Cowart's argument that our interpretation of § 33(g) leaves the notification requirements of § 33(g)(2) without meaning. An employee is required to provide notification to his employer, but is not required to obtain written approval, in two instances: (1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability. Under our construction the written approval requirement of § 33(g)(1) is inapplicable in those instances, but the notification requirement of § 33(g)(2) remains in force. That is why subsection (g)(2)

mandates that an employer be notified of "any settlement."

This view comports with the purposes and structure of § 33. Section 33(f) provides that the net amount of damages recovered from any third party for the injuries sustained reduces the compensation owed by the employer. So the employer is a real party in interest with respect to any settlement that might reduce but not extinguish the employer's liability. The written-approval requirement of § 33(g) "protects the employer against his employee's accepting too little for his cause of action against a third party." *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467, 20 L Ed 2d 30, 88 S Ct 1140 (1968). In cases where a judgment is entered, however, the employee does not determine the amount of his recovery, and employer approval, even if somehow feasible, would serve no purpose. And in cases where the employee settles for greater than the employer's liability, the employer is protected regardless of the precise amount of the settlement because his liability for compensation is wiped out. Notification provides full protection to the employer in these situations because it ensures against fraudulent double recovery by the employee.

As a final line of defense, Cowart's attorney suggested at oral argument that Nicklos' participation in the Transco settlement brought this case outside the terms of § 33(g)(1). Tr. of Oral Arg. 4-7. Relying on the recent decision of the Court of Appeals for the Fourth Circuit in *I.T.O. Corporation of Baltimore v. Sellman*, 954 F2d 239, 242-243 (1992), counsel argued that § 33(g)(1) requires

written approval only of "settlement[s] with a third person," and that Nicklos' participation in the Transco settlement meant it was not with a *third person*. Without indicating any view on the merits of this contention, we do not address it because it is not fairly included within the question on which certiorari was granted. See this Court's Rule 14.1(a).

We need not today decide the retroactive effect of our decision, nor the relevance of *res judicata* principles for other LHWCA beneficiaries who may be affected by our decision. Compare *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-123, 102 L Ed 2d 408, 109 S Ct 414 (1988). We do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary. It also provides a powerful tool to employers who resist liability under the Act. Counsel for respondents stated during oral argument that he had used the Transco settlement as a means of avoiding Nicklos' liability under the LHWCA. Tr. of Oral Arg. 23-26. These harsh effects of § 33(g) may be exacerbated by the inconsistent course followed over the years by the federal agencies charged with enforcing the Act. But Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.



For the reasons stated, the judgment of the Court of Appeals is Affirmed.

### SEPARATE OPINION

Justice **Blackmun**, with whom Justice **Stevens** and Justice **O'Connor** join, dissenting.

For more than 14 years, the Director of the Office of Workers' Compensation Programs interpreted the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.] (LHWCA or the Act), in the very same way that petitioner Floyd Cowart's estate now urges. Indeed, the Director *advocated* Cowart's position in the Court of Appeals, both before the panel and before that court en banc.

After certiorari was granted, however, and after Cowart's opening brief was filed, the United States informed this Court: "In light of the en banc decision in this case, the Department of Labor reexamined its views on the issue." Brief for Federal Respondent 8, n. 6. The United States now assures us that the interpretation the Director advanced and defended for 14 years is inconsistent with the statute's "plain meaning." The Court today accepts that improbable contention, and in so doing rules that perhaps thousands of employees and their families must be denied death and disability benefits. I cannot agree with the Government's newly discovered interpretation, and still less do I find it to be compelled by the "plain meaning" of the statute. The Court needlessly inflicts additional injury upon these workers and their families. I dissent.

### I

Ever since the LHWCA was adopted in 1927, it has included some version of the present § 33(g), 33 USC § 933(g) [33 USCS § 933(g)], the provision at issue in this case. Because that provision cannot be considered in isolation from the broader context of § 33, or indeed, the LHWCA as a whole, some background on the structure of the Act and the history of § 33's interpretation is essential.

### A

The LHWCA requires employers to provide compensation, "irrespective of fault," for injuries and deaths arising out of covered workers' employment. §§ 3(a) and 4(b), 33 USC §§ 903(a) and 904(b) [33 USCS §§ 903(a) and 904(b)]. In return for requiring the employer to pay statutory compensation without proof of negligence, the Act grants the employer immunity from tort liability, regardless of how serious its fault may have been. See §§ 5(a) and 33(i). Benefits under the LHWCA are strictly limited, generally to medical expenses and two-thirds of lost earnings, and are set out in detailed schedules contained in the Act itself. See §§ 7-9. A fundamental assumption of the Act is that employers liable for benefits will pay compensation "promptly," "directly," and "without an award" having to be issued. See § 14(a).

In a case where a third party may be liable, the LHWCA does not require a claimant to elect between statutory compensation and tort recovery. § 33(a). Where a claimant has accepted compensation under a formal award, then, within a specified time, he may file a civil

action against the third party. § 33(b). If a claimant recovers in that action, his compensation under the LHWCA is limited to the excess, if any, of his statutory compensation over the net amount of his recovery. § 33(f). Section 33(f) thus operates as a set-off provision, allowing an employer to reduce its LHWCA liability by the net amount a claimant obtains from a third party. Where the claimant nets as much or more from the third party as he would have received from his employer under the LHWCA, the employer owes him no benefits.

Section 33(g) of the LHWCA, 33 USC § 933(g) [33 USCS § 933(g)], addresses the situation in which a claimant-plaintiff settles an action against a third party for *less* than he would have received under the Act. Under § 33(f), considered alone, the claimant in this situation would always be able to collect the remainder of his statutory benefits from the employer. To protect the employer from having to pay excessive § 33(f) compensation because of an employee's "lowball" settlement, § 33(g) conditions LHWCA compensation, in specified circumstances, upon the employer's written approval of the third-party settlement. See *Banks v Chicago Grain Trimmers*, 390 U.S. 459, 467, 20 L Ed 2d 30, 88 S Ct 1140 (1968).

Before the LHWCA's 1984 amendments, § 33(g) provided that if a "person entitled to compensation" settled for less than the compensation to which he was entitled under the Act, then the employer would be liable for compensation, as determined in § 33(f), only if the person obtained and duly filed with the Department of Labor the employer's written approval of the settlement. The meaning of the term "person entitled to compensation" has

proved to be a difficult issue, both in the pre-1984 version of the Act and – as this case demonstrates – in the Act's current form.

## B

This issue apparently was considered first in *O'Leary v Southeast Stevedoring Co.*, 7 Ben Rev Bd Serv 144 (1977), *aff'd*, 622 F 2d 595 (CA9 1980). In that case, the employer denied liability for the death of the claimant's husband, contending that the decedent was not an employee covered by the LHWCA and that the injury did not arise out of his employment. 7 Ben Rev Bd Serv, at 145. The employer persisted in denying liability even after its position was rejected by the Benefits Review Board ("BRB").<sup>1</sup> See *id.*, at 146-147. Eventually, more than 28 months after her husband's accident, the claimant settled a third-party suit for \$37,500. About one month thereafter, an Administrative Law Judge (ALJ), on remand from the BRB, entered an award for the claimant. The value of the death benefits awarded, assuming that the claimant would live out her normal life expectancy without remarrying, amounted to more than \$150,000. See *O'Leary v Southeast Stevedoring Co.*, 5 Ben Rev Bd Serv 16 (ALJ) and 20 (ALJ) (1976). At that point, the employer contested liability for any compensation on the ground that, under § 33(g), the claimant had forfeited

<sup>1</sup> The BRB consists of persons appointed by the Secretary of Labor and empowered to "hear and determine appeals raising a substantial question of law or fact" with respect to LHWCA benefits claims. § 21(b)(3), 33 USC § 921(b)(3) [33 USCS § 921(b)(3)].



that compensation by failing to obtain the employer's written approval of the settlement.

The ALJ rejected the employer's position, reasoning that the claimant was not a "person entitled to compensation" at the time of the settlement. The BRB affirmed. The Board pointed out that the "underlying concept" of the LHWCA is that "the employer upon being informed of an injury will voluntarily begin to pay compensation." *O'Leary*, 7 Ben Rev Bd Serv, at 147 (citing § 14(a)). Further, the Board observed, § 33(g) refers to the conditions under which an employer will be "liable" for compensation under § 33(f); the reference to "liability," the Board reasoned, "contemplat[es] that the employer either be making voluntary payments under the Act or that it ha[s] been found liable for benefits by a judicial determination." *Id.*, at 148. Moreover, the Board continued, § 33(b) gives the employer the right to pursue third parties only if the employer is paying compensation under an award. Thus, the premise of employer rights under § 33, the Board concluded, is that the employer is "making either voluntary payments under the Act or pursuant to an award." *Ibid.*

The BRB observed that the employer in *O'Leary* had not paid compensation either voluntarily or pursuant to an award, but, instead, consistently had denied liability. It could hardly have been clear to the claimant at the time she settled her third-party suit that the BRB would ultimately decide in her favor. Indeed, only after that settlement and after the ALJ award did the employer concede that the claimant represented a "person entitled to compensation," and then only to argue that, for that reason, she had forfeited her right to compensation under § 33(g).

The Board emphasized that the employer's interpretation would place claimants in a severe bind:

"If a claimant was injured through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e.g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money. . . . " *Id.*, at 149.

And under the employer's interpretation of § 33(g), the employee would thereby forfeit all right to compensation under the Act. Surely, the Board concluded, "Congress by requiring written consent could not have contemplated such a result." *Ibid.*

The Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion, App 113, stating: "The Board's ruling is reasonable and furthers the underlying purpose of the Act." *Id.*, at 117. The Court of Appeals for the Fifth Circuit, in an unpublished opinion, upheld a similar BRB decision in 1984, finding the *O'Leary* approach "fully consistent with the language, legislative history, and rationale of" § 33(g). See *Kahny v OWCP*, 729

F 2d 777 (table) and App 96, 108. No other courts had occasion to examine the O'Leary interpretation before the LHWCA was next amended.

## C

The Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat 1639, revisited § 33(g). *Id.*, at 1652. The former § 33(g) was carried over, with minor changes not relevant here, as § 33(g)(1), and a new subsection (g)(2) was added. Section 33(g) now reads as follows:

"(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

"(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits

under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act."

In *Dorsey v Cooper Stevedoring Co.*, 18 Ben Rev Bd Serv 25 (1986), appeal *dism'd sub nom Cooper Stevedoring Co. v Director*, 826 F 2d 1011 (CA11 1987), the Board rejected an employer's argument that the final clause of the new § 33(g)(2) should be understood as overturning the O'Leary rule that no duty to obtain approval arises until the employer begins to pay compensation. Subsection (g)(1), the Board stated, reenacted the prior version of § 33(g) as it was interpreted in O'Leary; the new subsection, (g)(2), was intended to apply to situations not covered by (g)(1) or O'Leary. In these situations – where the employer has neither paid compensation nor acknowledged liability – notice, but not written approval, is required. 18 Ben Rev Bd Serv, at 29-30. The Board interpreted the final clause of (g)(2) – language that echoes the Board's words in O'Leary – to make clear that the notification requirement, described in (g)(2), was not subject to the O'Leary limitation that is incorporated in (g)(1). *Id.*, at 29.

This interpretation is reinforced, the Board continued, by two other considerations. First, although in a number of instances the 1984 legislative history indicates a congressional intention to override other BRB and judicial decisions, that history "indicates no congressional intent to overrule O'Leary." *Id.*, at 30. Second, the Board observed, this Court has held that the LHWCA "should be construed in order to further its purpose of compensating longshoremen and harbor workers 'and in a way



which avoids harsh and incongruous results.' " *Id.*, at 31, quoting *Voris v Eikel*, 346 U.S. 328, 333, 98 L Ed 5, 74 S Ct 88 (1953), and citing *Northeast Marine Terminal Co. v Caputo*, 432 U.S. 249, 268, 53 L Ed 2d 320, 97 S Ct 2348 (1977). As O'Leary made clear, allowing employers to escape all LHWCA liability by withholding approval from any settlement, while refusing to pay benefits or acknowledge liability, could hardly be thought consistent with the purpose of encouraging prompt, voluntary payment of LHWCA compensation.

## D

Such was the legal background against which Cowart's claim was considered. In the administrative proceedings, the BRB relied on O'Leary and Dorsey to reject the argument, offered by respondent Nicklos Drilling Company, that by failing to obtain prior written approval of his third-party settlement Cowart had forfeited his LHWCA benefits. Because Nicklos was not paying Cowart benefits, either voluntarily or under an award, the Board reasoned, Cowart was not a "person entitled to compensation" within the meaning of § 33(g)(1), and he therefore was not required to obtain Nicklos' approval of his settlement. 23 Ben Rev Bd Serv 42, 46 (1989). Instead, the Board held, Cowart was required only to give Nicklos notice of the settlement, as provided in § 33(g)(2). Because Nicklos indisputably had notice of the settlement – indeed, it had notice three months before the settlement was consummated – the Board ruled Cowart was eligible for LHWCA benefits.

On Nicklos' petition for review, the Director of the Office of Workers' Compensation Programs ("OWCP") – head of the agency charged with administering the Act – defended the Board's interpretation before the Court of Appeals for the Fifth Circuit. First a panel of the Court of Appeals, and then the full court, by a divided vote sitting en banc, however, rejected the Director's position, ruling that Cowart was a "person entitled to compensation" and was required by § 33(g)(1) to obtain Nicklos' written approval. See 907 F 2d 1552 (1990) (panel), and 927 F 2d 828 (1991) (en banc). We are told that after this Court granted certiorari, and after Cowart filed his opening brief, the Director "reexamined" his position and argued that the interpretation of § 33(g) he had maintained for 14 years, and defended in the Court of Appeals, was inconsistent with the Act's plain meaning.

## II

This Court today agrees with the Director's post-certiorari position that Cowart's claim for compensation is barred by the "clear meaning" of the statute "as written." Ante, at \_\_\_, 120 L Ed 2d, at 389. According to the Court, Cowart is plainly a "person entitled to compensation" within the meaning of § 33(g)(1), and his failure to obtain Nicklos' written approval of his third-party settlement requires, by the "plain language" of § 33(g), that he be deemed to have forfeited his statutory benefits. Although the Court does not identify any plausible statutory purpose whatsoever advanced by its reading, and although – to its credit – it acknowledges the "harsh effects" of its interpretation, ante, \_\_\_, at 120 L Ed 2d, at

394, the Court ultimately concludes that the language of § 33 compels it to reject Cowart's position.

In my view, the language of § 33 in no way compels the Court to deny Cowart's claim. In fact, the Court's reliance on the Act's "plain language," ante, at \_\_\_, 120 L Ed 2d at 389, is selective: as discussed below, analysis of §§ 33(b) and (f) of the Act shows that, even leaving aside the question whether Cowart is a "person entitled to compensation," a consistently literal interpretation of the Act's language would not require Cowart to have obtained Nicklos' written approval of the settlement. Indeed, under a thoroughgoing "plain meaning" approach, Cowart would be entitled to receive *full* LHWCA benefits in addition to his third-party settlement, not just the excess of his statutory benefits over the settlement.

At the same time, a consistently literal interpretation of the Act would commit the Court to positions it might be unwilling to take. The conclusion I draw is not that the Court should adopt a purely literal interpretation of the Act, but instead that the Court should recognize, as it has until today, that the LHWCA must be read in light of the purposes and policies it would serve. Once that point is recognized, then, as suggested by the Court's closing remarks on the "stark and troubling" implications of its interpretation, ante, at \_\_\_, 120 L Ed 2d at 394, it follows that recognition of Cowart's claim is fully consistent with the Act.

## A

Were the Court truly to interpret the Act "as written," it would not conclude that Cowart is barred from receiving compensation. Section 33(g)(1) of the LHWCA, on which the Court's "plain meaning" argument relies, provides that if a "person entitled to compensation" settles with a third party for an amount less than his statutory benefits, his employer will be "liable for compensation *as determined under subsection (f)*" only if the "person entitled to compensation" obtains and files the employer's written approval. The "plain language" of subsection (g)(1) does not establish any general written approval requirement binding either all "persons entitled to compensation," or the subset of those persons who settle for less than their statutory benefits. Instead, it requires written approval only as a condition of receiving compensation "as determined under subsection (f)." Where the "person entitled to compensation" is not eligible for compensation "as determined under subsection (f)," subsection (g)(1) does not require him to obtain written approval.

The "plain language" of subsection (f) in turn suggests that the provision does not apply to Cowart's situation. Subsection (f), by its terms, applies only "[i]f the person entitled to compensation institutes proceedings within the period prescribed in subsection (b)." And the "period prescribed in subsection (b)" begins, by the terms of that subsection, upon the person's "[a]cceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board." Cowart's third-party suit was clearly *not* instituted within this period: he filed suit



before any award of LHWCA benefits, and he still has not accepted (or been offered) compensation under any award. Thus, he does not come within the "plain meaning" of subsection (f), and, accordingly, for the reasons given above, he would not be bound by the subsection (g)(1) written-approval requirement. It would also follow that, because Nicklos indisputably received the notice required by subsection (g)(2), that provision would not bar Cowart from receiving LHWCA compensation and medical benefits.

Indeed, if Cowart is not covered by subsection (f), he would appear to have been eligible for a larger award than he sought. Subsection (f) does not authorize compensation otherwise unavailable; instead, it operates as a *limit*, in the specified circumstances, on the employer's LHWCA liability. If read literally, subsection (f) would not bar Cowart from receiving full LHWCA benefits, *in addition to* the amount he received in settlement of the third-party claim.

It is true that § 33(f) has not always been read literally. Subsection (f) has been assumed to be applicable where, for example, the claimant's third-party suit was filed after an employer *voluntarily* began paying LHWCA compensation, not just where compensation was paid pursuant to an award. See, e.g., *I.T.O. Corp. of Baltimore v Sellman*, 954 F 2d 239, 240, 243-245 (CA4 1992); *Shellman v United States Lines, Inc.*, 528 F 2d 675, 678-679, n. 2 (CA9 1975), cert. denied, 425 U.S. 936, 48 L Ed 2d 177, 96 S Ct 1668 (1976) (referring to the availability of an employer's lien, where the employer has paid compensation without an award, as "judicially created" rather than statutory). That interpretation is

eminently sensible and consistent with the statutory purpose of encouraging employers to make payments "promptly," "directly," and "without an award." See § 14(a). A contrary interpretation would penalize employers who acknowledge liability and commence payments without seeking an award, and it would reward employers who, whether in good faith or bad, contest their liability until faced with a formal award. See *Shellman*, 528 F 2d, at 679, n. 2 ("The purpose of this Act would be frustrated if a different result could be reached merely because the employer pays compensation without entry of a formal award.").

It is not obvious, however, that a similar argument from statutory purpose should be available to employers such as Nicklos who refuse to pay benefits and then seek shelter under § 33(f) (and by extension, § 33(g)(1)). And the fact remains that the Court professes to interpret the "clear meaning" of the statute "as written." The Court's interpretation today, however, is no more compelled by the language of the LHWCA than the interpretation Cowart defends: the Court is simply insensible to the fact that it implicitly has relied upon presumed statutory purposes and policy considerations to bring Nicklos and Cowart under the setoff provisions of § 33(f), thus absolving Nicklos of the first \$29,000 in LHWCA liability. Only at *that* point does the Court invoke the plain meaning rule and insist on a "literal" interpretation of § 33(g)(1). This selective insistence on "plain meaning" deprives Cowart's estate of the last \$6,242.77 Nicklos would otherwise have been bound to pay.

## B

For these reasons, I think it clear that a purely textual approach to the LHWCA cannot justify the Court's holding. In my view, a more sensible approach is to consider § 33(g) as courts always have considered the other parts of § 33 – in relation to the history, structure, and policies of the Act.

## 1

Looking first to § 33's history, for present purposes the most relevant aspect is the 1984 amendment to § 33(g) through which that provision assumed its present form. The amended provision clearly bears the impress of the Board's O'Leary decision. The reference in § 33(g)(2) to that subsection's applicability, "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits," tracks the limitation recognized in O'Leary – a limitation that had been unanimously approved by panels of two Federal Courts of Appeals. The question, then, is whether Congress sought to incorporate that holding or to repudiate it in the 1984 amendments to § 33(g).

The critical fact in this inquiry is Congress' use of the term "employee," rather than "person entitled to compensation," in connection with the notification requirement. The use of this term is in marked contrast to the other clauses of § 33(g). Section 33(g)(1) conditions § 33(f) compensation of a settling "person entitled to compensation" on securing the employer's written approval, and

§ 33(g)(2) provides, somewhat redundantly, that a "person entitled to compensation" forfeits all rights to compensation and medical benefits if the written approval mentioned in § 33(g)(1) is not obtained. The notification clause of § 33(g)(2), however, provides that "if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits . . . shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits" (emphasis added).

The use of the term "employee" in § 33(g)(2) strongly suggests that Congress intended to incorporate the BRB's holding in O'Leary. As mentioned, the language Congress chose for the last clause of § 33(g)(2) indicates that it was aware the Board had adopted a restrictive interpretation of the term "person entitled to compensation." Congress retained that term in connection with the written approval requirement of subsection (g)(1). Yet Congress chose the broad term, "employee," for the notification clause of subsection (g)(2), and "employee," unlike "person entitled to compensation," is a term expressly defined in the statute. See § 2(3).<sup>2</sup> The Court cannot explain why Congress would have chosen two different terms to apply to the different requirements. Indeed, on

<sup>2</sup> Subject to exceptions not applicable here, that section of the Act defines the term "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker."



the Court's interpretation, the two terms are identical in their extension. On the Court's reading, the term "person entitled to compensation" denotes only a statutory employee who has a claim that, aside from the requirements of § 33(g), would be recognized as valid. And that is exactly the denotation of the term "employee" in connection with the notification requirement. The fact that Congress chose to use different terms in connection with the different § 33(g) requirements – using, with respect to the written approval requirement, a term that it knew had been narrowly interpreted, and using, with respect to the notification requirement, a term broadly defined in the statute itself – surely indicates that Congress intended the two terms to have different meanings. Had Congress intended the meaning the Court attributes to it, it would have used the same term in both contexts.<sup>3</sup>

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<sup>3</sup> Two of the Court's other arguments concerning the 1984 amendments may deserve brief mention. First, the Court suggests in passing that "the legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn O'Leary," citing snippets of written testimony submitted during the lengthy 1981 hearings. See ante, at \_\_\_ to \_\_\_ 120 L Ed 2d, at 390-391. Needless to say, statements buried in hearings conducted *three years before the bill's passage* fall far short of demonstrating any such congressional intent. The BRB was correct when it said in Dorsey that the legislative history of the 1984 amendments indicates no intention to overturn O'Leary. Second, the Court places great significance upon the fact that "at least some elements within the Department of Labor" read the post-1984 statute differently from the Director of OWCP. Ante, at \_\_\_, 120 L Ed 2d, at 393. The Court is quite clear, however, that it is the Director who administers the Act, see ante, at \_\_\_, 120 L Ed 2d, at 392, not these other "elements," and that the Director does not ask for deference to his recently adopted interpretation.

The inference that Congress intended to adopt the O'Leary rule in the amended language of § 33(g) is only strengthened by consideration of the factual context to which the provision was designed to apply. As the Board noted in O'Leary, and as the Director argued to the Court of Appeals, the Act presumes that employers, as a rule, will promptly recognize their LHWCA obligations and commence payments immediately, without the need for a formal award. See § 14(a). In that situation, the claimant generally knows the value of the benefits to be received, and can accurately compare that figure to any settlement offer. The claimant in this situation has no strong interest in the precise amount of any settlement that nets less than the statutory benefits, so long as the costs of suit are covered, because by operation of § 33(f), he would not be allowed to retain any of the proceeds. On the other hand, the employer who has acknowledged liability has a strong interest in recovering from the third party any benefits already paid to the claimant and in reducing or eliminating any future benefits it has committed itself to pay. For the employer in this situation, the precise amount of a settlement for less than the claimant's statutory benefits is vitally important: any net dollar the claimant recovers in a third-party action is a dollar less the employer will have to pay in LHWCA benefits.

Given the parties' different incentives in the situation where the employer already is paying benefits, it makes sense to require the claimant to protect the employer's interest, by requiring settlements to be reasonable in the employer's judgment. At the same time, giving the employer this power of approval does not generally

threaten the claimant's interests, since, as mentioned, only the employer has an interest in settlements above the threshold of the claimant-plaintiff's expenses and below the amount of promised or delivered LHWCA benefits.

Matters are quite different, however, when (as in the present case) the employer has refused to make statutory payments and is not subject to an enforceable award at the time of settlement. First, the claimant generally will not be able to estimate with certainty whether he will receive any LHWCA benefits, let alone how much. Accordingly, the calculation required by § 33(g) – a comparison between LHWCA benefits and settlement amount – will be far more difficult. Second, the claimant who is not receiving LHWCA payments, and who cannot be certain that he ever will receive payments, will have a much more powerful interest in negotiating a third-party settlement that is as favorable as possible. This claimant, unlike its counterpart who is receiving payments, therefore will have a strong incentive – independent of the § 33(g) requirements – to protect any interest the employer might have in reducing potential LHWCA liability. Finally, disabled longshore employees, or the families of a longshoreman killed on the job, are likely to be in a highly vulnerable position, subject to financial pressure that may lead them to overvalue a present lump-sum payment and undervalue future periodic payments that might eventually be available under an LHWCA award.

The employer who refuses to pay, by contrast, has taken the position that it owes no LHWCA benefits that may be reduced through a third-party settlement, and thus that it has no real interest in the amount for which

the third party settles. Moreover, as has been noted, the claimant who is not receiving benefits has a strong incentive to protect the employer's interest in reducing or eliminating any LHWCA liability that might eventually be imposed. Under the Court's interpretation of § 33(g)(1), however, such an employer in many cases can ensure that it will never be required to pay LHWCA benefits, even if it might otherwise ultimately be determined to be liable, simply by withholding approval of any settlement offer, regardless of amount. In practice, recalcitrant employers will seek to exempt themselves from statutory liability by withholding approval of settlements, hoping that their employees' need for present funds will force them to settle without approval. I cannot believe that Congress intended to require LHWCA claimants to bet their statutory benefits on the possibility that future administrative and perhaps judicial proceedings, years later, might vindicate their position that the employer should have been paying benefits – particularly when the employer's asserted interest is already adequately protected independently of § 33(g)(1).

## 3

The Court recognizes the patent unfairness of this situation, and it as much as admits that its interpretation is out of line with the policies of the Act. See ante, at \_\_\_, 120 L Ed 2d, at 394. Nevertheless, the Court holds that the plain meaning of the term "person entitled to compensation" clearly applies to both categories of claimants – those whose employers have denied liability, as well as those whose employers have acknowledged that they must pay statutory benefits. See ante, at \_\_\_, 120 L Ed



2d, at 390. For that reason, the Court implies, regardless of what Congress may have thought it was accomplishing in the 1984 amendments, the words "person entitled to compensation" simply will not bear the construction O'Leary gave them. See ante, at \_\_\_, 120 L Ed 2d, at 391.

Even setting aside my doubts, expressed above, about the plain meaning rule's application to this statute, I am not persuaded by the Court's contention. In my view, it does not strain ordinary language to describe claimants whose employers have acknowledged LHWCA liability as "persons entitled to compensation," but to withhold that description from claimants whose employers have denied liability for compensation. This is particularly so, given the context in which the term appears in the statute. Section 33(g)(1) requires the "person entitled to compensation" to compare two figures – the amount of a settlement offer, on the one hand, and the amount of compensation to which the person is entitled, on the other. But what is that latter figure in a situation in which the employer denies liability in full or in part? Doubtless, the claimant could hazard a guess by consulting the Act's jurisdictional provisions concerning who is covered for which kind of accident, the compensation schedules included in the Act, and, in the case of a disability claim, the opinion of the claimant's doctor that the claimant in fact is disabled. The very nature of the situation, however, is that it is not clear that such a person is indeed "entitled to compensation" – that question, after all, is exactly the issue that the employer's position requires to be determined in administrative and perhaps subsequent judicial proceedings. The O'Leary

limitation of the term "person entitled to compensation" to the situation in which the claimant's employer has acknowledged liability and commenced payments seems to me fully consistent with the requirements of ordinary language.

It is true, as the Court observes, that under the O'Leary interpretation, the term "person entitled to compensation" would take on different meanings in different contexts. See ante, at \_\_\_, 120 L Ed 2d, at 391. This Court, however, has not inflexibly required the same term to be interpreted in the same way for all purposes. Compare *Barnhill v Johnson*, \_\_\_ U.S. \_\_\_, and n. 9; 118 L Ed 2d 39, 112 S Ct 1386 (1992) with *id.*, at \_\_\_, 118 L Ed 2d 39, 112 S Ct 1386 (Stevens, J., dissenting) (noting that the maxim is "not inexorable," but arguing that because "nothing in the [statute's] structure or purpose" counsels otherwise, the Court should have applied it). This Court has recognized:

"Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. . . .

"It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers, Inc. v United States*, 286 U.S. 427, 433, 76 L Ed 1204, 52 S Ct 607, 609 (1932).

This case is one in which the statutory term in question should be read contextually, rather than under the assumption that the term necessarily has the same meaning in all contexts. The phrase "person entitled to compensation" is not defined in the statute, and it is susceptible of at least two interpretations – a "formalist" interpretation, according to which one may be entitled to compensation whether or not anyone ever acknowledges that fact, and a "positivist" or "legal realist" interpretation, according to which one is entitled to compensation only if the relevant decisionmaker has so declared. Which of these two senses is "correct" will depend upon context. The latter sense, I have suggested, is appropriate to a context in which liability for compensation is disputed and the employee is called upon to predict the future course of administrative and perhaps judicial proceedings – not just as to liability, but as to the precise amount of liability. And, in any event, I think, the text and circumstances of the 1984 amendment to § 33(g) indicate that Congress intended to adopt the "realist" interpretation found in O'Leary.

Moreover, the Court simply has failed to apply, or even mention, a maxim of interpretation, specifically applicable to the LHWCA, that strongly supports Cowart's position. This Court long has held that "[t]his Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Director, OWCP v Perini North River Associates*, 459 U.S. 297, 315-316, 74 L Ed 2d 465, 103 S Ct 634 (1983), quoting *Voris v Eikel*, 346 U.S., at 333, 88 L Ed 5, 74 S Ct 88. The only point at which the Court in this case consults the purposes of the Act is at the end of its

opinion, when it assures the reader that its interpretation of the *notification requirement* of § 33(g)(2) – as opposed to its interpretation of the written approval requirement stated in § 33(g)(1) – is consistent with the statute's purposes. See ante, at \_\_\_, 120 L Ed 2d at 393. Finally, underscoring its refusal to apply the maxim of liberal construction to this case, the Court ultimately acknowledges that the interpretation of § 33(g) it has adopted has "harsh effects" and "creates a trap for the unwary." Ante, at \_\_\_, 120 L Ed 2d, at 394. For my part, I can imagine no more appropriate occasion on which the maxim should be applied.

## 4

Once it is recognized that a claimant whose employer denies LHWCA liability is not a "person entitled to compensation" for purposes of § 33(g)(1), the proper resolution of this case is clear. Cowart was just such a claimant, and, accordingly, he was not bound by § 33(g)(1)'s written approval requirement. It is undisputed that he satisfied the notice requirement of § 33(g)(2). It follows that § 33(g) is no bar to Cowart's eligibility for benefits.

## III

The Court recognizes "the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute." Ante, at \_\_\_, 120 L Ed 2d, at 394. It attempts to justify the "harsh effects" of its decision on the ground that it is but the faithful agent of the legislature, and "Congress has spoken with great clarity to the precise



question raised by this case." Ibid. In my view, Congress did not answer the question in the way the Court suggests, let alone did it do so "with great clarity." The responsibility for today's unfortunate decision rests not with Congress, but with this very Court.

I dissent.

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**INGALLS SHIPBUILDING DIVISION, LIT-  
TON SYSTEMS, INC., Petitioner,**

**v.**

**John H. WHITE and Director, Office of  
Workers' Compensation Programs, U. S.  
Department of Labor, Respondents.**

**No. 80-4002.**

**United States Court of Appeals,  
Fifth Circuit.**

**July 26, 1982.**

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Paul M. Franke, Jr., Gulfport, Miss., John H. Carlson,  
Pascagoula, Miss., for petitioner.

Roy Axelrod, San Francisco, Cal., for amicus curiae  
Bethlehem Steel Corp. et al.

Mark C. Walters, Joshua T. Gillelan, II, U. S. Dept. of  
Labor, Washington, D. C., for Director, Office of Workers  
Compensation Programs.

Roland Skinner, Biloxi, Miss., for White.

Petition for Review of an Order of the Benefits  
Review Board.

Before CLARK, Chief Judge, THORNBERRY and  
GARZA, Circuit Judges.

THORNBERRY, Circuit Judge:

The Director of the Office of Workers' Compensation  
Programs, Department of Labor, asks this court to decide  
whether administrative law judges have the power to

approve compromise settlements under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* The Director argues that the power to approve settlements under the LHWCA lies solely in the offices of the deputy commissioner and the Secretary. Appellant Ingalls Shipbuilding Division, Litton Systems, Inc., and Bethlehem Steel Corp. and Triple A Shipyards as amicus insist that administrative law judges share this authority. Ingalls urges in addition that the Director lacks standing either to appeal the approved compromise settlement to the Benefits Review Board or to appear before this court as an appellee defending the Board's order.

This dispute began with an event that appears far removed from the issues in this appeal. The LHWCA claimant, John W. White, was injured on February 17, 1977, in the course of his employment as a shipfitter for Ingalls Shipbuilding, when a 350-pound pressing ram crushed his right hand. After receiving compensation for temporary total disability, White sought relief under the LHWCA for any permanent injury he had sustained. His claim could not be resolved in the deputy commissioner's office because the parties could not agree on the extent of injury. The deputy commissioner, therefore, referred the claim to an administrative law judge (ALJ) for a formal hearing as permitted under 33 U.S.C. § 919.

Before a hearing could be held, however, on January 11, 1979, the parties informed the ALJ that they had agreed to a compromise settlement under 33 U.S.C. § 908(i)(A). The settlement was based on a medical report by Dr. L. Conrad Rowe, who found that White was suffering from a 25% permanent partial disability of the right

hand, but that he could continue to work if he refrained from lifting heavy objects. Under the terms of the settlement, Ingalls agreed to pay White \$25,000, on the condition that it did not have to rehire him, and to pay all medical bills related to his injury. It also promised to pay White's attorney \$2,300. The ALJ did not remand the case to the deputy commissioner to obtain his approval of the settlement terms. Instead, he issued an Order Approving Settlement on January 30, 1979. The order stated that the settlement was "in the best interests of Claimant" and "in accord with *Clefstad v. Perini North River Associates*, 9 BRBS 217, BRB No. 77-584 (1978)." The judge's reference to *Clefstad* is a crucial part of any order approving settlement. In this instance, however, it proved to be insufficient to sustain the order.

Upholding the authority of administrative law judges to approve settlements, the Benefits Review Board held in *Clefstad* that before he approves a proposed settlement, an ALJ must consider the claimant's age, education, work history, medical condition, and the availability of the type of work that the claimant is able to perform. 9 BRBS at 222. While the ALJ below cited *Clefstad*, he did not discuss the evidence underlying each *Clefstad* factor. This failure to follow *Clefstad* to the letter as well as fear that the \$25,000 lump sum settlement would be inadequate to compensate the claimant for his injuries prompted the Director to appeal the order to the Benefits Review Board under 33 U.S.C. § 921(b)(3).

With the advantage of full briefing and oral argument, the Board rejected appellant's contention that the Director lacked standing to appeal the ALJ's order. It found that Congress intended the standing requirement



to appear before the Board to be satisfied more easily than the standing criteria for appearance in federal court. In fact, the Board held that the Director had "automatic" standing "in any case before the Board." Thus able to reach the merits of the ALJ's order approving settlement, the Board found the ALJ's treatment of Clefstad to be inadequate and remanded the order for "a complete rationale according to the guidelines set forth in Clefstad." Ingalls then appealed to this court under 33 U.S.C. § 921(c).

## I. JURISDICTION

Section 921(c) of the LHWCA provides that "(a)ny party adversely affected or aggrieved by a *final order* of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred. . . ." 33 U.S.C. § 921(c) (emphasis supplied). Although none of the parties has raised the issue of whether the Board's action in this case constitutes a "final order," it is our threshold duty to determine whether we have subject-matter jurisdiction of this petition for review. Accordingly, we must inquire whether Ingalls' petition for review from a remand order of the Benefits Review Board is final under § 921(c).

The "final order" requirement of § 921(c) furthers the same policies as the finality rule embodied in 28 U.S.C. § 1291 (1976). Thus, finality under both statutes holds the same meaning. *Director, Office of Workers' Compensation Programs v. Brodka*, 643 F.2d 159, 161 (3d Cir. 1981). It is a well-established rule of appellate jurisdiction that a remand order to an administrative agency is ordinarily

not treated as a final order. *National Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 626 F.2d 106, 108 (9th Cir. 1980).<sup>1</sup> This circuit has followed the rule of other circuits in holding that this general rule mandates dismissal of a petition for review from a remand order of the Benefits Review Board if the court finds that the Board's decision is not a final order. *United Fruit Co. v. Director, Office of Workers' Compensation Programs*, 546 F.2d 1224, 1225 (5th Cir. 1977).<sup>2</sup>

Like every rule, however, this principle of appellate jurisdiction has exceptions. *National Steel & Shipbuilding Co.*, *supra*, 626 F.2d at 108. We hold that the appeal in this case falls within the exception to the final judgment rule as stated in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964). In *Gillespie*, the administratrix of the estate of her son, Daniel, brought actions against the vessel owner-employer to recover damages for Daniel's death for herself and on behalf of Daniel's brother and sisters under the Jones Act and the Ohio wrongful death statute. The vessel owner moved to dismiss all reference to the laws of Ohio and the claims of Daniel's brother and sisters. The trial court granted the motion. Gillespie appealed for herself, joined by the brother and sisters. The vessel owner moved to

<sup>1</sup> Similarly, a state supreme court decision remanding to a lower court is not a "final decision" under 28 U.S.C. § 1257. *O'Dell v. Espinoza*, \_\_\_ U.S. \_\_\_, 102 S.Ct. 1865, 72 L.Ed.2d 237 (1982).

<sup>2</sup> In *United Fruit Co.*, we dismissed the appeal as premature because the appellant had petitioned from an order of the Board remanding the case to the ALJ for a finding on the extent of the claimant's liability. 546 F.2d at 1225.

dismiss the appeal on the ground that the rulings appealed from were not "final" decisions under 28 U.S.C. § 1291. The Sixth Circuit reached the merits of the controversy without deciding the question of appealability. The Supreme Court reversed on the merits, but held that the decision of the trial court was "final" for purposes of § 1291.

The Court recognized that the question of finality was frequently so close that "it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." 379 U.S. at 152, 85 S.Ct. at 311. The requirement of finality, therefore, "is to be given a 'practical rather than a technical construction.'" *Id.*, quoting from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). This practical assessment involves two competing considerations: " 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " *Id.* at 152-53, 85 S.Ct. at 311. Finding that the eventual costs would be less if it reached the merits and that to do otherwise would unnecessarily delay recovery, the Supreme Court held that a practical interpretation of § 1291 justified its maintaining jurisdiction of the appeal.<sup>3</sup>

We conclude that a decision on the merits of this appeal does not raise the specter of piecemeal review

<sup>3</sup> For recent decisions discussing *Gillespie*, see *Weil v. Investment Indicators Research & Management*, 647 F.2d 18, 27 (9th Cir. 1981); *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 903 (5th Cir. 1981), cert. denied, 454 U.S. 892, 102 S.Ct. 387, 70 L.Ed.2d 206 (1981).

before the court. The only issue presented that is directly related to the remand order is whether the ALJ made the appropriate findings in his original order approving settlement. The remaining issues, which involve the standing of the Director and the authority of the ALJ to approve lump-sum settlements, are purely matters of law and are "final" in that they have been litigated and decided by the Benefits Review Board. The question of whether the ALJ's order approving settlement conformed with *Clestad* does not undermine finality in this instance for the following reasons.

If we were to dismiss for lack of jurisdiction to allow the ALJ to reconsider the settlement and if we were to find on a later appeal that the ALJ lacked authority to approve lump-sum settlements, a dismissal at this stage in the proceedings would be entirely purposeless, for the ALJ's power to reconsider the settlement depends completely on our interpretation of the relevant enabling statute. This result would create much greater "cost and inconvenience" than would an immediate decision on the merits. Moreover, a dismissal with the threat of reversal on future appeal ultimately could work a harsh injustice on the claimant, since the delay caused by dismissal could put him that much further off from the recovery to which he unquestionably is entitled. Failure to dismiss, by contrast, poses no similar potential for prejudice to Ingalls.

*Wescott v. Impresas Armadoras, S. A. Panama*, 564 F.2d 875, 881 (9th Cir. 1977), supports our consideration of these consequences. Wescott sued Impresas for injuries he sustained while working as a longshoreman employed by Brady Hamilton Stevedore Company aboard a ship



owned by Impresas. Brady intervened to deny its negligence and to recover against Impresas any monies paid to Wescott for workmen's compensation. The jury decided the special issues in favor of the longshoreman, and the district court denied Impresas' motion for judgment notwithstanding the verdict. In denying the motion, the district judge did not address the intervening employer's counterclaim against Impresas. Applying the "practical" test of *Gillespie*, the Ninth Circuit refused to dismiss the appeal to permit the district court to resolve the dispute as to the intervenor's rights against Impresas for two reasons, both of which are compelling in the instant appeal. First, the intervenor's rights turned solely on matters of law. See also *Lockwood v. Wolf Corp.*, 629 F.2d 603, 608 n.3 (9th Cir. 1980); *Aetna Life Insurance Co. v. Harris*, 578 F.2d 52, 54 n.1 (3d Cir. 1978). Second, the court recognized that if it held that the district court should have granted the motion for judgment notwithstanding the jury verdict, then a dismissal to the trial court would be futile because the intervenor's rights were dependent on a judgment in favor of the plaintiff – just as the ALJ's authority in this case is dependent on a decision in favor of Ingalls.

Upon balancing the competing considerations above, we find that the facts here fall within the unique situation that is established as an exception to technical finality in *Gillespie*. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 478 n.30, 98 S.Ct. 2454, 2462 n.30, 57 L.Ed.2d 351 (1978). We, therefore, hold that the decision of the Benefits Review Board is a final order within the meaning of § 921(c), and that we may properly entertain jurisdiction of the appeal.

## II. ORDER APPROVING SETTLEMENT

Appellant contends at the outset that the ALJ's order approving settlement is analogous to a consent decree and that the Director, therefore, cannot appeal to the Benefits Review Board in the absence of proof that would nullify the parties' consent. Appellant cites no law to justify this conclusion, and we find it both unpersuasive and erroneous.

Though there is no authority specifically addressing the reviewability of an order approving settlement of a LHWCA claim, there is instructive precedent on the reviewability of consent decrees in other contexts. See *United States v. City of Miami*, 664 F.2d 435, 441 nn. 10-13 (5th Cir. 1981) (en banc), where the court discusses the responsibilities of district and appellate courts in assessing settlements of class actions, stockholders' derivative suits, and compromises of claims in bankruptcy. It is clear that when the district judge is required by law to ascertain specific facts before approving a settlement, the appellate court will examine that determination to ensure that it is "fair, adequate and reasonable." Contrary to appellant's assertions, review is not limited to ascertaining whether consent is valid or whether the district judge abused his discretion: "(T)he degree of appellate scrutiny must depend on a variety of factors, such as the familiarity of the trial court with the lawsuit, the stage of the proceeding at which the settlement is approved, and the type of issues involved. *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980).

Thus, even if we accept Ingalls' contention that an order approving settlement is like a consent decree, we

find that an ALJ, in approving the settlement of a LHWCA claim, is limited in the same manner as a district judge approving a compromise in a class action or stockholders' derivative suit. Though the criteria for approval are different, the purpose of approval is the same – to protect the interests of the parties within constitutional and statutory strictures and to ensure that the decree is consistent with the public policy objectives sought to be attained by Congress in enacting the statutory right of action. *City of Miami, supra*, 664 F.2d at 441. The ALJ in examining a proposed settlement of longshoreman's claim is required to consider specific facts that help determine the size of award that the claimant deserves. *Clefstad, supra*, 9 BRBS at 222. The Benefits Review Board, like any appellate court, plays an indispensable role in overseeing settlement approval just as it did in this case: if review was precluded, there would be no check on ALJ approval, a result that could frustrate Congress' intent in passing the LHWCA. The likelihood of frustrating legislative intent appears even greater in a case such as this one, where the power of the ALJ to approve agreed settlements in the first instance is at issue. Thus, even if we treat the ALJ's order approving settlement like a consent decree, as appellant bids us, we find ample support in law and logic for holding that it is reviewable.

### III. DIRECTOR'S STANDING TO APPEAL

As this court explained in *Director, Office of Workers' Compensation Programs v. Donzi Marine, Inc.*, 586 F.2d 377, 378 (5th Cir. 1978), the 1972 amendments to the LHWCA provide a two-step process for review of any compensation order entered under the Act by a duly appointed

hearing officer. 33 U.S.C. § 921 (1976). Under section 921(b), "any party in interest" may appeal the decision of the hearing officer to the Benefits Review Board. Subsequently, "any person adversely affected or aggrieved by a final order of the Board" may appeal that order to the United States court of appeals for the circuit in which the injury occurred. 33 U.S.C. § 921(c). Ingalls argues that the Director is neither a "party in interest" nor a "person adversely affected or aggrieved," and that therefore, the Director has no standing either to petition the Benefits Review Board or to act as respondent in this appeal. We examine each of these contentions in turn.

#### A. The Director's Standing to Respond to Proceedings Brought Under § 921(c)

First, we must dispose of Ingall's argument that the Director lacks standing to respond in this court. Ingalls relies for the strength of its argument on a line of cases that deny the Director standing as a petitioner under § 921(c) because he is not a "person adversely affected or aggrieved." See *Director, Office Workers' Compensation Programs v. Bethlehem Steel Corp.*, 620 F.2d 60 (5th Cir. 1980); *Fusco v. Perini North River Associates*, 601 F.2d 659, 670 (2d Cir. 1979), *vacated on other grounds*, 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed.2d 664 (1980), *on remand* 622 F.2d 1111, *aff'd*, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 119 (1981); *Donzi Marine, supra*, 586 F.2d at 382; *I.T.O. Corporation of Baltimore v. Benefits Review Board*, 542 F.2d 903, 909 (4th Cir. 1976), *vacated sub nom. Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088, *rev'd on remand on other grounds*, 563 F.2d 646, 648 (1977). Apart



from *I.T.O.*, these cases do not address the question of when the Director may appear as a respondent, and therefore, they are distinguishable from the Director's position here. Upon examining *I.T.O.* and the other decisions addressing the issue of when the Director may appear as a respondent in a federal court of appeals, see *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C.Cir.1982); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied, 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed.2d 952 (1981); *United Brands Co. v. Melson*, 569 F.2d 214 (5th Cir. 1978) (single judge order); *Krolick Contracting Corp. v. Benefits Review Board*, 558 F.2d 685, 689-90 (3d Cir. 1977); *Nacirema Operating Co., Inc. v. Benefits Review Board*, 538 F.2d 73, 75 (3d Cir. 1976); *Offshore Food Services, Inc. v. Benefits Review Board*, 524 F.2d 967 (5th Cir. 1975); *McCord v. Benefits Review Board*, 514 F.2d 198, 200-01 (D.C.Cir.1975), we hold that the Director is a proper party before this court.<sup>4</sup>

While this Court has recognized previously that the Director must establish some pecuniary or administrative interest to petition the court of appeals for review under 33 U.S.C. § 921(c), *Bethlehem Steel Corp.*, supra, 620 F.2d at 60, and *Donzi*, supra, 586 F.2d at 382, no panel in this Circuit has discussed the issue of when the Director

<sup>4</sup> The Supreme Court has expressly declined to rule on this issue: "Petitioners named the Director rather than the BRB as a respondent in the Court of Appeals and neither party has raised any question in this Court concerning the identity of the federal respondent. This question is therefore not before us." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 256 n.11, 97 S.Ct. 2348, 2353, 53 L.Ed.2d 320 (1977).

could appear as a respondent.<sup>5</sup> We, therefore, must cut through the bramble of conflicting legal doctrines and determine the appropriate rule for this Circuit. Compare *I.T.O.*, supra, 542 F.2d at 909, with *Shahady*, supra, 673 F.2d at 481-84.

We have discovered three possible grounds for decision. First, we could require the Director to demonstrate

<sup>5</sup> The issue has been raised in this Circuit, but no panel has provided a rationale by which to decide the question. In *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 546 (5th Cir. 1976), vacated sub nom on other grounds, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), on remand, 575 F.2d 79 (5th Cir. 1978), aff'd, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979), the court allowed the Director to respond because a prior panel in the same case granted the Director's motion to be added as a respondent. The latter decision apparently was unpublished. Neither of the panel opinions discuss the appropriate standard for allowing standing to respond, and the unique procedural facts of the case have been construed to diminish its precedential value. See *Director, Office Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310, 333-34 (7th Cir. 1977).

In *Offshore Food Service*, supra, 524 F.2d at 967, this Court in a per curiam decision granted a motion by the Benefits Review Board to dismiss it as a party respondent under § 921(c). The court relied on cases granting similar motions by the Board on the ground that the Board was not a necessary party to the appeal. Since there is no analysis of the question in *Offshore Food Service*, it is impossible to discern the specific basis for the court's decision. Furthermore, the Director rather than the Board is seeking to respond in the instant case. The decision, therefore, does not eliminate the problem before us. By contrast, Judge Roney in *United Brands Co. v. Melson*, supra, 569 F.2d at 215, examines the issue at length, but his opinion is a single judge order, and as such, it lacks the precedential weight of a panel decision. We have concluded, in view of these decisions, that the issue merits full examination.

some injury in fact, economic or otherwise, to justify his standing as respondent in § 921(c) proceedings, just as we did when the Director sought to petition this Court for review in *Donzi*, *supra*. Second, we could rely on the broad language of Fed.R.App.P. 15(a), which requires a petitioner for review of an agency order to name the agency as a respondent. Finally, we could consider the statutory scheme of the LHWCA and regulations promulgated thereunder as the D.C. Circuit did in *Shahady*, *supra*, 673 F.2d at 481-83. For the following reasons, we rely on Rule 15(a).

Ingalls urges us to adopt the first approach, which has been articulated most strongly by judges in the Fourth Circuit. In *I.T.O.*, a divided en banc panel held that the Director was required to show a stake in the outcome of the controversy in order to respond to a petition for review under § 921(c). *I.T.O.*, *supra*, 542 F.2d at 907. To reach this conclusion, the court relied solely on the language of the section itself: "Since the Act is not specific, it follows that, if the Director is to be named a party, he must be 'adversely affected or aggrieved by a final order of the Board' within the meaning of § 921(c)." *Id.* The court made no distinction between respondents and petitioners and did not discuss Rule 15(a). Applying § 921(c), the court engaged in the traditional inquiry of whether the Director had suffered an "injury in fact." The court found that the Director's general duty to assist claimants and provide them legal assistance did not give him a sufficient stake in the outcome to permit him to respond as a matter of right. It admitted, however, that the Director could seek permissive intervention under Fed.R.Civ.P. 24(b), and that his application ordinarily

would be granted. The court did not apply Rule 24(b) to the case before it because the Director had made no motion under the Rule.<sup>6</sup>

We do not follow the Fourth Circuit. If the Director has standing to petition the Review Board under § 921(b)(3), an issue that we will examine subsequently, then he should have the right to appear in this court to defend a decision by the Board in his favor. The absence of any contrary language in § 921(c), or elsewhere in the LHWCA, referring to the agency's capacity to respond suggests to us, not that the Director should be included in the "adversely affected or aggrieved" requirement that governs who may petition for review, but that his standing to respond is governed by other rules.

Rule 15(a) of the Federal Rules of Appellate Procedure provides the method for obtaining review of an order of an administrative agency in the court of appeals: "The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. . . . In each case, the agency shall be named respondent." "Agency" as defined in the rule includes "agency, board, commission or officer." Rule

<sup>6</sup> The Fourth Circuit recently applied its analysis in *I.T.O.* to allow the Director to respond under § 921(c). In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 113 (4th Cir. 1982), the Director petitioned for review of the Board's finding that an employee qualified for compensation from a special fund established in 33 U.S.C. § 908. Because the Director is charged with administering the special fund, and protecting it from unjustified claims, the court held that he had "more of a direct interest than the Director did in *I.T.O. Corp.*" *Id.* at 113. But see *Shahady v. Atlas Tile & Marble Co.*, *supra*, 673 F.2d at 483.



15(a) is generally applicable to statutory review proceedings within this Court's original jurisdiction. This Court has such jurisdiction under § 921(c). Prior to 1972, § 921(c) identified the "deputy commissioner making the order" as a respondent. The amended version of § 921(c) is silent as to who shall appear as respondent for the agency, but the Secretary has filled that gap by promulgating 20 CFR § 802.410(b), which names the Director to represent the Department of Labor in review proceedings. Thus, it appears that the rule requires Ingalls to name the Director as respondent in its petition.

Despite the blunt, and seemingly mandatory requirement of Rule 15(a), however, the courts have created an exception to its applicability in cases where the private parties seeking review of an agency proceeding are sufficiently adverse. As the D.C. Circuit explained in *McCord*, *supra*: "Normally, a single private party is contesting the action of an agency, which [the] agency must appear and defend on the merits to insure the proper adversarial clash requisite to a 'case or controversy.' . . . Here there is sufficient adversity between *McCord* and Mrs. Cepthas (the claimant) to insure proper litigation without participation by the Board." 514 F.2d at 200. The court concluded that the rationale of Rule 15(a) does not apply in this circumstance. We do not consider here the wisdom of adopting this judicial exception as a precedential rule in this Circuit because we are not faced with the question. Adversity clearly exists between Ingalls and the Director for there would be no respondent without the presence of the agency. Rather, we need only decide whether Rule 15(a) is generally applicable to review proceedings under § 921(c).

The D.C. Circuit recently has avoided reliance on Rule 15(a) when faced with the issue. *Shahady*, *supra*, 673 F.2d at 484. It held in *Shahady* that "the Director, OWCP shall be named as federal party-respondent in all petitions for review brought under section 21(c) of the LHWCA, 33 U.S.C. § 921(c)." *Id.* at 485. The Court relied on the "Director's central role in the legislative and regulatory scheme" created by the LHWCA. It declined to rest its decision on Rule 15(a) primarily because it believed that the rule applies only to a proceeding where the agency respondent appears to defend the commission or board decision as the legal representative of the agency. 673 F.2d at 484. It reasoned that because the Director can disagree with the Board's decision, as he has in this case, he is not the "agency" interest referred to in Rule 15(a). We do not agree with the D.C. Circuit's construction of Rule 15(a). While it may provide a sound basis for allowing the agency to withdraw from a petition for review when it seeks to do so, it does not apply to a proceeding in which the Director demands to appear as a respondent. We find no language in the comments to rule 15(a), in the cases construing it, or in the major treatises to mandate this restrictive interpretation of the Rule. Certainly, under some statutory schemes the agency will be the only party in opposition to the claimant, particularly when the claimant is seeking benefits from the government instead of his employer. When the agency participates as a respondent in these types of proceedings, it represents the agency position in a typical adversarial posture. The LHWCA, admittedly, does not envision a procedural scheme of this nature, but this distinction does not render the plain language of Rule 15(a) inapplicable.

First, the broad language of Rule 15(a)<sup>7</sup> suggests an intent to encompass a wide variety of agency proceedings. It also indicates a recognition that the agency would not be the only respondent in a petition for review of an agency order. This would account for the potential "three party case" that may arise under the LHWCA, in which the claimant, his employer, and the Director participate. The only express limitation on the applicability of Rule 15(a) is found in Fed.R.App.P. 1(b), which provides that the rules cannot be construed to extend or limit the

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<sup>7</sup> Rule 15(a) provides in entirety:

(a) Petition for Review of Order; Joint Petition. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

jurisdiction of the courts of appeals. Allowing the Director to respond to a petition for review in proceedings under § 921(c) does not cross the bounds of this restriction.

Second, the review procedures established by the 1972 Amendments to the LHWCA and the regulations promulgated thereunder suggest that Rule 15(a) applies to proceedings under § 921(c). As the Third Circuit in *Krolick* recognized, the failure of the Act to name a respondent is instructive:

The reference to a specific agency respondent in the pre-1972 version of 33 U.S.C. § 921(b) was included prior to the adoption of the Federal Rules of Appellate Procedure. Perhaps although no clear legislative history on the subject has been called to our attention, the omission of a reference to the proper respondent when § 921(b) was amended in 1972 was a conscious recognition of the more general reference in Rule 15(a).

*Krolick, supra*, 558 F.2d at 689-90.<sup>8</sup> Furthermore, the Director is unmistakably the entity within the agency who "represents" the agency. The Director is the administrator of the Act, and he therefore bears the responsibility of ensuring its fair and consistent operation.<sup>9</sup> The Secretary has provided specifically that: "The Director, OWCP as

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<sup>8</sup> Prior to 1972, there was no subsection c to § 921. The "§ 921(b)" referred to in *Krolick* set out the procedure for appeal prior to 1972 which was replaced in 1972 by 33 U.S.C. § 921(c).

<sup>9</sup> Congress has charged the Secretary with the duty to administer the Act, 33 U.S.C. § 939, but the Secretary has delegated that duty to the Director, 20 C.F.R. § 701.201.



designee of the Secretary of Labor responsible for the administration and enforcement of the [Act], shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA." 20 C.F.R. § 802.410(b).

The broad language of Rule 15(a) must be applied with a common sense regard for the variety of agency proceedings that produce appealable administrative orders. When a party decides to petition for review of an agency's order, it generally should name as respondent under Rule 15(a) that entity within the agency that the agency head has designated to respond on behalf of the agency. We conclude, then, reading Rule 15(a) together with the LHWCA and the regulations promulgated thereunder, that the Director is the agency-respondent within the contemplation of Rule 15(a), and that therefore, he is entitled to respond in this Court over Ingall's objection.

#### B. The Director's Standing to Petition the Benefits Review Board

Having decided that the Director is a proper party respondent in this appeal, we now must turn to the issue of whether the Director was entitled to petition the Board for review of the ALJ's order approving settlement as a "party in interest" under 33 U.S.C. § 921(b)(3). The Board found that the Director had automatic standing under 20 C.F.R. § 802.201(a), which defines "party" or "party in interest" to mean "The Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." Though this Circuit has recognized the Director's right to

seek review automatically in dicta, it has not faced squarely the contention that Congress never intended the Director to appear before the Board in a case where the claimant and employer agree. *Donzi*, *supra*, 586 F.2d at 378 n.5. We hold today that the Director is a "party in interest" under § 921(b)(3) as defined in 20 C.F.R. § 802.201(a), and therefore, that he was entitled to petition the Benefits Review Board for review of the order approving settlement of White's claim.

Ingalls asks this Court to apply the analysis of *Donzi* to this question of administrative standing. Again, we point out that *Donzi* was limited to the issue of whether the Director had judicial standing to petition this Court for review under § 921(c). *Donzi* would control standing under § 921(b)(3) only if this Court found that § 921(c) and § 921(b)(3) designate the same class of persons as parties. We reject Ingalls' proposed rationale for several reasons.

First, and fundamentally, administrative proceedings before the Benefits Review Board are not Article III proceedings to which either the "case or controversy" or prudential standing requirements apply. See *American Trucking Associations, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982). Within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court. *Ecee, Inc. v. Federal Energy Regulatory Commission*, 645 F.2d 339, 349 (5th Cir. 1981). In fact, Congress in its discretion can require that any person be admitted to administrative proceedings whether or not that person has alleged an "injury in fact." *Koniag, Inc., UYAK v. Andrus*, 580 F.2d 601, 612 (D.C.Cir.1978)

(Bazelon, J. concurring), *cert. denied*, 439 U.S. 1052, 99 S.Ct. 733, 58 L.Ed.2d 712 (1978). Moreover, cases construing § 921(c) have indicated that an "aggrieved party" under that subsection is not a "party in interest" under § 921(b)(3). *Donzi*, *supra*, 586 F.2d at 378 n.5; *I.T.O.*, *supra*, 542 F.2d at 908. The imposition of less restrictive standing requirements on administrative adjudicatory bodies simply recognizes that they often act as "legislative courts," and as such, they demand a wider discretion than Article III courts to determine who may appear before them. See *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C.Cir.1976).

Second, by using two distinct phrases – "parties in interest" and "persons adversely affected or aggrieved" – Congress reveals an intent to establish two distinct tests for standing to petition for review of administrative orders issued under the Act. The Secretary of Labor, pursuant to his general authority to prescribe regulations under the LHWCA, treats § 921(b)(3) and § 921(c) as if they created different standards. "Party in interest" means the Secretary, his designee, and anyone "directly affected" by the order. 20 C.F.R. § 801.2(a)(10). Under 20 C.F.R. § 802.410(a), by contrast, only persons "adversely affected or aggrieved" may petition for review in the court of appeals.

A finding that *Donzi* does not control the meaning of party in interest unfortunately does not end our inquiry. We cannot discuss the statutory and regulatory language relevant to this issue as briefly as we would like because Ingalls has drawn our attention to an apparent contradiction in the regulations that on its face seems to negate our interpretation of § 921(b)(3). Ingalls also demands that we invalidate 20 C.F.R. § 801.2(a)(10) as an unconstitutional

extension of agency authority since it arguably goes beyond the "interest" requirement of § 921(b)(3) by conferring automatic standing on the Director. To resolve the issue of the Director's administrative standing we must turn to these problems in regulatory construction.

First, we will address the superficial inconsistency in the regulations. In addition to defining "party in interest" and limiting the parties who may appeal to the courts of appeals, the Secretary also states "(a)ny party *adversely affected* by a decision or order issued pursuant to one of the Acts may appeal that decision or order to the Board by filing a notice of appeal." 20 C.F.R. § 802.201 (emphasis supplied). Ingalls insists that this regulation equates "party in interest" to persons "adversely affected or aggrieved" in § 921(c). We disagree. Obviously, Ingalls' proposed construction of the regulation would be inconsistent with Congress' intent to create two separate standing tests. We prefer to construe the regulations in a manner that is in harmony with that intent. It is not unusual or extraordinary to find that similar phrases have more than one meaning in statutory and regulatory sections that embody separate purposes. This happens frequently in the sentences that constitute our laws, and it is indicative, not of bureaucratic confusion, but of the truth that we have a finite set of words to describe an infinite variety of situations. Reading § 802.2(a)(10) and § 802.201 together, we find that "adversely affected" in the context of § 921(b)(3) does not contradict the phrase "directly affected." As a practical matter, the Director will not petition the Board for review unless the administrative order has affected his interests in an adverse manner. The real question under the regulations, then, is not



whether the effect is adverse, but whether the Director has an interest that has been affected directly by the order. We therefore, find that 20 C.F.R. § 802.201 adds no substantive meaning to the definition of "party in interest" in § 801.2(a)(10), and that the regulations interpreting § 921(b)(3) and § 921(c) do not impose the requirements of judicial standing on the parties who appear before the Board.

Now we must decide whether the definition of "party in interest" in § 801.2(a)(10), which gives the Director an automatic right of review, is valid in view of the plain requirement in 33 U.S.C. § 921(b)(3) that a person demonstrate some "interest" before petitioning the Board for review. Unless clearly erroneous or unreasonable, the interpretation of a statute by a regulatory agency that is charged with administering it is given considerable deference by federal courts. *Florida v. Mathews*, 526 F.2d 319, 323 n.10 (5th Cir. 1976). See also *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 721 (6th Cir. 1979), *aff'd*, 445 U.S. 1, 100 S.Ct. 883, 63 L.Ed.2d 154 (1980). Moreover, the Supreme Court has made it emphatically clear that absent some constitutional or statutory constraint "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519, 544, 98 S.Ct. 1197, 1211, 55 L.Ed.2d 460 (1978), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143, 60 S.Ct. 437, 441, 84 L.Ed. 656 (1940). Bearing in mind the foregoing doctrines, we turn to the

issue of whether 20 C.F.R. § 801.2(a)(10) is a valid construction of § 921(b)(3). Resolution of this question depends on whether the Director's statutory duties under the LHWCA automatically establish an "interest" directly affected by a compensation order.

The Director of the Office of Workers' Compensation Programs is an office of administrative creation to which the Secretary of Labor has delegated the responsibility of administering the Act. 20 C.F.R. §§ 701.201, 701.202(a). That Congress intended the Secretary to play an active role in implementing, administering and enforcing the LHWCA is manifest from a reading of the Act and from an examination of its legislative history. For example, the Director must furnish upon request information and assistance to claimants regarding their legal rights and medical and vocational rehabilitation services. 33 U.S.C. § 939(c). He must actively supervise the medical care rendered to injured employees. 33 U.S.C. § 907(b). He administers a special fund established by the Act for payment of certain benefits in enumerated circumstances. 33 U.S.C. § 944. And, as a preventive measure, the Act allows the Director to bring an action in federal court to restrain violations of his safety regulations. 33 U.S.C. § 941(e).

Ensuring the active involvement of the Secretary through his Director was one of the central purposes underlying the 1972 Amendments:

Section 39 of the Act (33 U.S.C. § 939) is amended to substantially increase the Secretary's responsibility for administering this program so far as providing services to employees. . . . It is intended that this assistance

be all inclusive and enable the employee to receive the maximum benefits due to him without having to rely on outside assistance other than that provided by the Secretary.

S.Rep.No. 92-1125, 92d Cong., 2d Sess. (1972); H.R.Rep.No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S.Code Cong. & Ad.News 4698, 4710. In a later statement, the Committee on Human Resources, successor to the Committee on Labor and Public Welfare, issued a report on the Black Lung Benefits Reform Act, which speaks directly to the standing of the Director within the review procedures established by the LHWCA:

In establishing the Longshore Act procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. The Secretary's interest as the officer charged with the responsibility of carrying forth the interest of Congress with respect to the Act should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for enforcement of the Act, to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board, and appropriate United States Courts.

S.Rep.No. 95-209, 95th Cong., 1st Sess. 22 (1977).<sup>10</sup> See also *Director, Office of Workers' Compensation Programs v.*

<sup>10</sup> Although this 1977 report does not have the authoritative value of legislative history made contemporaneously with the passage of the 1972 amendments, it nevertheless is persuasive extrinsic evidence of congressional intent, particularly in

*Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982).

Despite persuasive evidence that Congress intended the Director to have standing as a party in interest under § 921(b)(3), Ingalls insists that the wide ranging supervisory responsibilities of the Director cannot justify the Director's interference when the claimant and employer agree on a settlement. The restrictive manner in which the Act treats lump-sum settlements belies this proposition. The LHWCA specifically limits the circumstances under which an employee may resolve his claim under the act through an agreed settlement with his employer.<sup>11</sup> If the private parties have agreed on the future liability of the employer, § 908(i)(A) demands that they obtain the approval of a deputy commissioner. If the settlement involves medical benefits, then the parties must obtain the approval of the Secretary. 33 U.S.C. § 908(i)(B). The settlement will not receive the approval of the Secretary or the deputy commissioner unless it is "in the best interests" of the claimant. The Board, in finding that administrative law judges share the authority to approve settlements under section 8(i)(A), has established in addition to the statutory prerequisites a set of criteria that must be considered before a settlement can be deemed

view of Congress' silence on the standing question when it passed the 1972 Amendments to the LHWCA. See *Director, Office of Workers' Compensation Programs v. Boughman*, 545 F.2d 210, 216 (D.C.Cir.1976).

<sup>11</sup> In a similar manner, Congress has prohibited waiver, 33 U.S.C. § 915(b), and assignment, 33 U.S.C. § 916, of LHWCA claims, except as permitted by other sections of the Act.



"in the best interests" of the claimant. *Clefstad, supra*, 9 BRBS at 222.

The Director's interest as administrator within this procedural scheme for settlement approval appears obvious. First, he must make sure that the deputy commissioners and the administrative law judges are acting within their authority. Second, he must examine orders approving settlement to determine whether the approving authority considered the correct criteria. The Director's participation in the case before us, more clearly than any example we might conjure, demonstrates the need for us to respect his "watchdog" role. We, therefore, do not regard the Director's exercise of his right to initiate review of an order approving settlement as "officials intermeddling." To the contrary, it is simply part of his statutory obligation to ensure the fair and adequate compensation of injured employees.

In light of the Director's involvement in the administration and enforcement of the Act and Congress' intent with respect to that role, 20 C.F.R. § 201.2(a) is a reasonable and valid construction of 33 U.S.C. § 921(b)(3). Accordingly, we hold that the Benefits Review Board properly granted the Director standing to petition for review of the ALJ's order approving settlement.

#### IV. AUTHORITY OF ADMINISTRATIVE LAW JUDGES TO APPROVE AGREED SETTLEMENTS UNDER THE LHWCA

Having determined that the Director is a proper party before this Court, we reach the question of whether an administrative law judge has the authority to approve

a compromise settlement under 33 U.S.C. § 908(i)(A). That subsection provides:

Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915(b) and section 916 of this title. . . .

Interpreting § 908(i)(A) in *Clefstad v. Perini North River Associates*, 9 BRBS 217, 220, BRB No. 77-884 (1978), the Benefits Review Board found that "both deputy commissioners and administrative law judges, within their respective spheres of authority, are empowered by the Act to approve or disapprove agreed settlements by the parties according to the claimant's best interests." The Board relied primarily on legislative history accompanying the 1972 Amendments to § 908 and on the 1972 amendment of 33 U.S.C. § 919(d). The latter amendment transferred "all powers, duties, and responsibilities" with respect to administrative hearings under the Act from the deputy commissioner to administrative law judges. Looking to the Administrative Procedure Act (APA) to define the scope of an officer's hearing functions, the Board determined that settlement approval lies within the adjudicative province of the ALJ once he "dons his judicial hat." 9 BRBS at 222. It is for this Court to decide whether the Board's reasoning in *Clefstad* as applied to this case is correct.

No circuit court has discussed and decided the precise issue before us. In *Marine Concrete v. Director, Office of*

*Workers' Compensation Programs*, 645 F.2d 484 (5th Cir. 1981), this Court construed a companion section, § 908(i)(B), which provides:

Whenever the Secretary determines that it is for the best interests of injured employee entitled to medical benefits, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such medical benefits.

33 U.S.C. § 908(i)(B). We held that administrative law judges were not empowered by this section to approve settlements involving medical benefits: " 'It is not our province . . . to write legislation that Congress either overlooked or designedly chose not to write.' " *Id.* at 487, quoting from *S. H. DuPuy v. Director, Office of Workers' Compensation Programs*, 519 F.2d 536, 541 (7th Cir. 1975), *cert. denied*, 424 U.S. 965, 96 S.Ct. 1459, 47 L.Ed.2d 732 (1976).<sup>12</sup> Though we noted the legislative history behind § 908(i)(A), we did not address the authority of an ALJ to approve settlements under that section.<sup>13</sup> Confronting the

<sup>12</sup> In *DuPuy* the Seventh Circuit held that neither deputy commissioners nor administrative law judges are authorized to approve settlements of death claims under the LHWCA. A death claim is not lodged under § 908 but under 33 U.S.C. § 909, which is silent on whether settlements of death claims are permitted. The court did not decide whether an ALJ has the power to approve a settlement agreement in the case of an injured employee. 519 F.2d at 541.

<sup>13</sup> *Ingalls Shipbuilding Corp. v. Joyner*, 587 F.2d 649 (5th Cir. 1978), on petition for rehearing, 587 F.2d 650 (5th Cir. 1979), is another case related to the issue at hand but not controlling. In *Joyner*, we considered the issue of whether this Court has the power to approve a compromise settlement and dismiss an

issue for the first time, we stress that although this Court will defer to the Board's decision in some instances, *see Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 177 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977), it is elementary that we are not bound by an erroneous interpretation of a statute. *Charter Limousine v. Dade County Board of County Commissioners*, 678 F.2d 586, 588 (5th Cir. 1982); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1011 (5th Cir. 1981), *cert. denied*, 554 U.S. 1080, 102 S.Ct. 633, 70 L.Ed.2d 613 (1982). We do not need precedent to recognize that § 908(i)(A) is plain on its face in stating that deputy commissioners may approve agreed settlements. Generally when there is no ambiguity in the words of a statute, a court may not consider legislative history or other rules of construction. *United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *Connecticut v. United States E.P.A.*, 656 F.2d 902, 909 (2d Cir. 1981); *Glenn v. United States*, 571 F.2d 270, 271 (5th Cir. 1978). While we think § 908(i)(A) is sufficiently clear to fall within this simple rule of construction, Ingalls would argue that other sections in the

appeal from a Board decision. The employer's settlement offer was conditioned on our approval. It provided for withdrawal if we remanded to the Director for approval. We, therefore, followed our action in an unreported case, *Ingalls Shipbuilding Corp. v. Spicer* (5th Cir. 1975) [Slip Op. No. 74-3465, April 18, 1975], and approved the settlement without confronting the problem of jurisdiction. Since *Spicer* also avoids the jurisdictional issue and since the disposition of *Joyner* is expressly limited to its facts, *Joyner*, *supra*, 587 F.2d at 650, we do not regard these circumscribed decisions as creating a precedential rule that controls our conclusion in this case. *See Marine Concrete*, *supra*, 645 F.2d at 488.



1972 Amendments to the LHWCA, specifically 33 U.S.C. § 919(d), give rise to the possibility of alternative interpretations.

Section 919(d) of the Act provides:

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of Section 554 of Title 5. Any such hearing shall be conducted by an administrative law judge qualified under 3105 of that Title. All powers, duties, and responsibilities vested by this Chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. § 919(d). We do not think the addition of APA procedures or the delegation of responsibilities to administrative law judges in the Act contradicts the plain mandate of § 908(i)(A) that only deputy commissioners can approve agreed settlements.

The context in which § 919(d) was passed suggests that Congress did not intend to transfer the power to approve settlements to the administrative law judges. Prior to the 1972 Amendments, deputy commissioners could approve agreed settlements only with the approval of the Secretary. *See* S.Rep.No.92-1125, 92d Cong., 2d Sess. 38 (1972). In 1972, Congress eliminated the necessity of obtaining the Secretary's approval of settlements under § 908(i)(A), but inserted that prerequisite in new § 908(i)(B) for claims involving medical benefits. *See Marine Concrete, supra*, 645 F.2d at 486. Section 914(j), 33 U.S.C., which allows deputy commissioners in specified

instances to discharge an employer's liability upon payment of a lump sum, also requires deputy commissioners to obtain the Secretary's approval. This brief glimpse into legislative history tells us two things. First, when the "power, duties, and responsibilities" of the deputy commissioners with respect to hearings were delegated to administrative law judges in 1972, the deputy commissioners did not have the independent authority to approve compromise settlements under § 908(i)(A). Their approval had to be accompanied by the approval of the Secretary. Second, the caution with which Congress has granted any authority to approve settlements suggests that so radical a change as delegating that responsibility to administrative law judges is likely to have been treated explicitly in the statute. *See* S.Rep.No.1988, 75th Cong., 3d Sess. 6 (1938).

Furthermore, the APA does not confer the power to approve settlements on administrative law judges in LHWCA proceedings. *Ingalls and Bethlehem Steel* as amicus rely heavily on the "(n)otwithstanding any other provisions of this chapter" qualification in § 919(d). When we turn to the APA, however, we find similar qualifications. Section 556, 5 U.S.C., which sets out the powers and duties of hearing officers, specifically provides that those powers are "subject to the published rules of the agency." *See also* 5 U.S.C. § 554(c) (1).<sup>14</sup> The regulations

<sup>14</sup> Section 554(c)(1) provides that the agency shall give interested parties opportunity for:

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment

promulgated under the LHWCA are perfectly consistent with the clear import of § 908(i)(A) for they clearly contemplate that only the deputy commissioner will approve agreed settlements under § 908(i)(A). 20 C.F.R. § 702.241. We, therefore, conclude once again that "[t]he general provisions of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, . . . do not alter the later-enacted and more specific provisions of the LHWCA." *Marine Concrete, supra*, 645 F.2d at 487.

Even assuming that some ambiguity exists between the powers delegated in § 919(d) of the Act and the restrictions on settlement in § 908(i)(A), we find no support in the legislative history explaining § 908(i)(A) to justify an interpretation contrary to the plain meaning of the words used.<sup>15</sup> Too much ado has been made over a statement in the Senate and House Reports accompanying the 1972 Amendments, which, when read of context, suggests that Congress inadvertently said "deputy commissioner" when it meant "deputy commissioner, hearing officer, and court." The Committee on Labor and Public

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when time, the nature of the proceedings, and the public interest permit.

5 U.S.C. § 554(c)(1) (emphasis supplied). The italicized clause allows for the special situation presented here: where the particular agency statute provides for a limited, clearly defined procedure of settlement approval, the general provision of the APA will not supplant it.

<sup>15</sup> Turning at last to the legislative history underlying § 908(i)(A), we are mindful of the common sense rule "the plainer the language [of the statute], the more convincing contrary legislative history must be." *United States v. United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir.), *cert. denied*, 414 U.S. 909, 94 S.Ct. 229, 38 L.Ed.2d 147 (1973).

Welfare in a section-by-section analysis of proposed bill S.2318, reported:

Subsection 8(i)(A) provides that the *deputy commissioner, Board, or Court* may approve a settlement discharging an employer from liability for compensation if he deems it to be in the best interests of the employer.

S.Rep.No.92-1125, 92d Cong., 2d Sess. 26 (1972) (emphasis supplied). We noted this statement in *Marine Concrete* suggesting that it supported "the proposition that the ALJ has authority to approve settlements under Subsection A," *Marine Concrete, supra*, 645 F.2d at 486 n.2, and therefore, it is perhaps the fault of this Court that the parties have expended an undue amount of time and energy discussing the effect of the statement on the decision at hand. We hope our decision today will eliminate any confusion that has arisen over the legislative history of § 908(i)(A). The irrelevance of this committee comment to the issue presented is immediately, and painfully, apparent upon turning to the section in the report that sets out proposed bill S.2318. The analysis in the report refers to a proposed statutory section that explicitly allows either "the deputy commissioner or hearing officer or Board or court" to approve agreed settlement. S.Rep.No.92-1125, 92d Cong., 2d Sess. 38 (1972). This version of the proposed bill was not the final form adopted by both Houses. 33 U.S.C. § 908(i)(A); S.2318, 92d Cong., 2d Sess., 118 Cong.Rec. 36,390 (1972); H.R. 12,006, 92d Cong., 2d Sess., 118 Cong.Rec. 36,376 (1972). That Congress omitted "Board or court" from the final version of the bill suggests even more strongly that it



intended to limit the power of settlement approval under § 908(i)(A) to deputy commissioners.

We have discovered nothing apart from this one statement in the committee reports referring to an earlier version of the amendments to suggest that § 908(i)(A) does not mean exactly what it says. "Congress has put down its pen, and [the Court] can neither rewrite Congress' words nor call it back 'to cancel half a line.'" *Director, Office of Workers' Compensation Programs v. Rasmussen*, 440 U.S. 29, 47, 99 S.Ct. 903, 913, 59 L.Ed.2d 122, 135 (1979). We hold accordingly. When the parties to proceedings under the LHWCA find that they can agree to a settlement of the compensation claim after the case has been referred to an ALJ, the ALJ must remand the case to the deputy commissioner for ultimate approval of the settlement. While we find no language in the Act that would prevent an ALJ from recommending a settlement, only deputy commissioners can approve agreed settlements under § 908(i)(A).

Though this result may impede "judicial efficiency, see *Clefstad, supra*, 9 BRBS at 222, to a slight extent, it is consistent with the policies underlying the LHWCA which overshadow the usual tendency of the courts to encourage the settlement of claims. When Congress first amended the LHWCA to afford interested parties the opportunity to reach a settlement agreement, it did so with caution: "Experience, however, warns against lump-sum payments merely as a convenience in disposing [of LHWCA claims]. Large payments of compensation are in most cases soon dissipated, or improvidently or foolishly invested, leaving the employee an early dependent upon charity." S.Rep.No.1988, 75th Cong., 3d Sess. 6 (1938). See

also A. Larson, *The Law of Workmen's Compensation* § 82.41 (1976). The speed with which settlements are brought about is, therefore, of less importance than assurance that the settlement is in the claimant's best interest. Insofar as our ruling today imposes another check on the agreed resolution of claims, it furthers the Act's conservative approach to settlement approval.<sup>16</sup>

## V. CONCLUSION

Asserting jurisdiction under the *Gillespie* exception to the final judgment rule, we decide today that the Director, Office of Workers' Compensation Programs, is the appropriate party-respondent under Fed.R.App.P. 15(a), and therefore, that he has standing to respond to Ingalls' petition for review in this Court under § 921(c). We also conclude that 20 C.F.R. § 801.2(a)(10) is a reasonable and valid construction of "party in interest" as it is used in § 921(b)(3), and thus we affirm the Board's finding that the Director was entitled to petition for review of the order approving settlement. Finally, this Court holds that administrative law judges do not have the authority to approve lump-sum settlements under 33 U.S.C. § 908(i)(A). For this reason, we reverse and remand to the Benefits Review Board for proceedings consistent with this opinion.

<sup>16</sup> Because we find that administrative law judges lack the authority to approve lump sum settlements, we do not reach the question of whether the ALJ below considered the proposed settlement in accordance with the criteria set out by the Board in *Clefstad, supra*, 9 BRBS at 222.

AFFIRMED IN PART; REVERSED AND REMANDED  
IN PART.

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I. T. O. CORPORATION OF BALTIMORE,  
Employer, and Liberty Mutual Insurance Com-  
pany, Carrier, Petitioners,

v.

BENEFITS REVIEW BOARD, U. S. DEPART-  
MENT OF LABOR, Respondent,

William T. Adkins, Respondent,

International Longshoremen's Association,  
Amicus Curiae.

MARITIME TERMINALS, INC., and Aetna  
Casualty and Surety Co., Petitioners,

v.

SECRETARY OF LABOR, and Donald D.  
Brown, Respondents.

MARITIME TERMINALS, INC., and Aetna  
Casualty and Surety Co., Petitioners,

v.

Vernie Lee HARRIS, and United States Depart-  
ment of Labor, Respondents.

NATIONAL ASSOCIATION OF STEVE-  
DORES et al., Petitioners,

v.

BENEFITS REVIEW BOARD, U. S. DEPT. OF  
LABOR, Respondent,

William T. Adkins, Respondent.

Nos. 75-1051, 75-1075, 75-1196  
and 75-1088.



United States Court of Appeals,  
Fourth Circuit.

Argued May 4, 1976.

Decided Aug. 26, 1976.

David R. Owen, Baltimore, Md. (Francis J. Gorman, Semmes, Bowen & Semmes, Baltimore, Md., on brief), for Liberty Mut. Ins. Co.

John B. King, Jr., Norfolk, Va. (Vandeventer, Black, Meredith & Martin, Norfolk, Va., on brief), for Maritime Terminals and Aetna Cas. and Surety Co.

Donald A. Krach, Baltimore, Md. (William C. Stifler, III, Paul B. Lang, Niles, Barton & Wilmer, Baltimore, Md., Thomas D. Wilcox, Washington, D. C., on brief), for Nat. Ass'n of Stevedores.

Linda L. Carroll, Atty., Washington, D. C. (William J. Kilberg, Sol. of Labor, Marshall H. Harris, Associate Sol., George M. Lilly, Karen L. Gilbert, Attys., U. S. Dept. of Labor, Washington, D. C., on brief), Amos I. Meyers, Baltimore, Md. (Terry Paul Meyers, Baltimore, Md., on brief), Charles S. Montagna, Norfolk, Va., for respondents.

Thomas W. Gleason, Jr., New York City (Herzl S. Eisenstadt, Richard H. Kapp, New York City, on brief), for International Longshoremen's Ass'n, AFL-CIO as amicus curiae.

Before HAYNSWORTH, Chief Judge, and WINTER, CRAVEN, BUTZNER, RUSSELL and WIDENER, Circuit Judges, in banc.

WINTER, Circuit Judge:

These consolidated appeals present two major questions: (1) the extent of coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (sometimes "LHWCA"), to persons engaged in the necessary steps in the overall process of loading and unloading a vessel but who, prior to the Amendments, could claim benefits for accidental injury or death, sustained in the process, only under state law; and (2) whether, in a petition for review under 33 U.S.C. § 921(c), the Director, Office of Workers' Compensation Programs, Department of Labor, is a proper respondent. The appeals were first heard and decided by a divided panel of the court. *I. T. O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4 Cir. 1975). Chief Judge Haynsworth and I, comprising the majority, held that during the loading and unloading process the coverage of the Act extended to the first (last) point of rest. As applied to the facts, this holding resulted in the conclusion that none of the three claimants was entitled to benefits. Judge Craven was of a contrary view. He would have held that the three claimants were engaged in maritime employment on navigable waters of the United States, as defined in the Act, and hence they should be entitled to benefits under the Act for their accidental injuries. The panel was unanimous in deciding that the Director was not a proper respondent, although it was recognized that, in a proper case, he might be permitted to become an intervenor.

Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeals in banc. At the time

the appeals were reargued, the in banc court consisted of six judges.

# I.

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opinion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship. In Adkins' case, a container was removed from the ship and stored in the marshaling area. From there the container was moved to a shed where it was stripped and the contents were stored. Adkins was injured when he was moving the contents from the storage area onto a waiting delivery truck. The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment. Accordingly, Judge Widener concurs in the judgment of Chief Judge Haynsworth, Judge Russell and me to reverse Adkins' award.

In Brown's case, the cargo was brought from somewhere inland and deposited in a warehouse. Brown, operating a forklift, picked up cargo and stuffed it into a container. While stuffing the container, Brown was injured. When the stuffing would have been completed, a hustler would have carried the container to the marshaling area, and from there the container would have been taken to the pier to be loaded on board. Thus, in Judge Widener's view, Brown was engaged in the overall process of loading the ship. The cargo was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded on board ship, and Brown was engaged in the loading process. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Brown.

Harris was a hustler who was injured while he was taking a container, stuffed with goods which had been stored after inland delivery, from the stuffing area to the marshaling area. From the marshaling area, the container would have been taken to the pier where it would have been loaded on board. The goods were being moved solely for loading purposes, not for mere convenience, and therefore, in Judge Widener's view, Harris, like Brown, was engaged in the overall process of loading the ship. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Harris.

Judge Craven and Judge Butzner subscribe to the views expressed by Judge Craven in his dissenting panel opinion, and for those reasons and the additional reasons expressed by Judge Butzner in his separate opinion



attached hereto, they vote to affirm the awards made to Adkins, Brown and Harris.

By the majority votes of Chief Judge Haynsworth, Judge Russell, Judge Widener and me, the award to Adkins (Nos. 75-1051 and 75-1088) is reversed. By an equally divided court, the awards to Brown and Harris (Nos. 75-1075 and 75-1196) are affirmed.

## II.

On the issue of whether the director is a proper respondent, an issue raised only in Nos. 75-1051 and 75-1088, Chief Judge Haynsworth, Judge Russell, Judge Widener and I subscribe to the views expressed in the majority panel decision as hereafter amplified. Judge Craven and Judge Butzner subscribe to the views expressed in Judge Butzner's separate opinion attached hereto.

## III.

Chief Judge Haynsworth, Judge Russell, Judge Widener and I amplify our conclusion that the Director is not a proper respondent as follows:

Prior to the 1972 Amendments, the Act provided for judicial review by an injunction suit against the deputy commissioner making a compensation award. The pertinent part of 33 U.S.C. § 921(b) (1970), as amended, 33 U.S.C. § 921(c) (1976 Supp.), provided:

If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in

interest against the deputy commissioner making the order, and instituted in . . . the judicial district in which the injury occurred . . . .

One of the 1972 Amendments revised § 921 so that subsection (c), the counterpart of the previous subsection (b), now provides:

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court . . . a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted . . . to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings . . . .

Certainly the deputy director was a party to pre-1972 litigation, but neither he nor his counterparts is expressly designated as a party by the 1972 Amendments. The legislative history is unenlightening as to the reason for this omission. While it is true that old § 921a<sup>1</sup> provided

<sup>1</sup> 33 U.S.C. § 921a, as amended, 33 U.S.C. § 921a (1976 Supp.):

In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

that the United States Attorney would represent the Secretary or the Deputy Commissioner in any court proceedings under old § 921, and that § 921a was continued by the 1972 Amendments although modified to permit the Secretary to appoint his own counsel,<sup>2</sup> the legislative history is again unenlightening. To conclude from the mere existence of new § 921a that the Secretary, or his designee, the Director, is automatically a party to a review proceeding is to beg the question. This section's existence can as well mean only that if otherwise made a party, *e. g.*, by intervention in a review proceeding, the Secretary or Director will be represented by attorneys appointed by him.

Indeed, § 939(c)(1), added by the 1972 Amendments, suggests the latter reading. It provides that "(t)he Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim." It would be a redundancy for the Secretary to be authorized to provide legal services to a prevailing claimant if the Secretary himself was intended actively to litigate to sustain an award.<sup>3</sup> Thus, unlike the pre-1972 Act and

<sup>2</sup> 33 U.S.C. § 921a (1976 Supp.):

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

<sup>3</sup> We fail to understand how the Director's statutory duty to provide legal assistance to claimants confers upon him a stake in the proceedings independent of that of any claimant, as apparently urged by the dissent. The issue we confront is not whether the Director may appear before us as Adkins'

numerous other laws providing for judicial review or orders of administrative agencies,<sup>4</sup> the LHWCA, as

representative, but whether the Director may participate in his own behalf.

We also note that we find nothing in the statute or its legislative history to indicate that the availability of legal assistance to claimants may be made to turn upon whether the Director agrees or disagrees with the decision which a claimant seeks to appeal, as the dissent appears to suggest, *infra*, at p. 909 ("If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review.").

<sup>4</sup> Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a government benefit and the government agency which seeks to withhold it. Thus, when review of agency action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FPC, *see* 16 U.S.C. § 8251(b), or an unsuccessful claimant for Supplemental Security Income before the Secretary of H.E.W., *see* 42 U.S.C. §§ 405(b), 1383(c)(3), it is clear that the agency must be named a respondent since it is the party against whom relief is sought; the court could not grant an effective remedy without its presence. (Conversely, these agencies would never have reason to seek review of their own decisions.) In LHWCA cases, on the other hand, it is the private employer or insurance carrier which will have to pay any award which may be entered.

The Labor Management Relations Act is more nearly similar to the LHWCA, since under it, as under the LHWCA, disputes are adjudicated between antagonistic private parties. And the NLRB may be called upon to defend its decisions in court. *See* 29 U.S.C. § 160(f). However, the NLRB's status as a party in the courts of appeals derives from its enforcement powers. *See id.* ("Upon the filing of such petition [for review], the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section [granting the Board power to enforce its decisions in court], and shall have the same jurisdiction . . . to make and enter a decree enforcing,



amended in 1972, does not on its face make the Director a respondent to a petition to review under § 921(c).

Since the Act is not specific, it follows that, if the Director is to be a party, he must be a "person adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). Whether he is or is not is a question closely akin to the issue of whether the "case or controversy" requirement of Article III of the Constitution has been met.

Generally, to be adversely affected or aggrieved under the statute or to present a case or controversy under the Constitution, one must have suffered "injury in fact, economic or otherwise." See K. Davis, *Administrative Law* (1970 Supp.) § 22.00-1 at 706; 3 *id.* § 22.02. Therefore, to be a party before this court, the Director must have some concrete stake in the outcome of the case.

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modifying . . . or setting aside in whole or in part the order of the Board"). Thus, like the FCC, the FPC, the Secretary of H.E.W. and other agencies, the NLRB is an adverse party in court because adjudication is being sought of *its* right to grant relief in behalf of the prevailing party before it. The Director, Office of Workmen's Compensation Programs has no enforcement powers comparable to those of the NLRB.

Moreover, it is not the decision of the *Director* which is called into question by a petition for review under 33 U.S.C. § 921(c), but that of the Benefits Review Board. Thus, the Director does not possess even a concrete interest in defending his *own* decision in court, as does, for example, a district judge against whom a writ of mandamus is sought. As we noted in the majority panel opinion, the Benefits Review Board has specifically asked that it *not* be denominated a party respondent in these proceedings. To that request, we acceded.

The Director asserts he has the requisite stake because

[h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged as the designee of the Secretary of Labor.

The Secretary of Labor's administrative duties, delegated to the Director, see 20 C.F.R. § 701.202, are set out in 33 U.S.C. § 939. Subsection (c)(1) is most arguably relevant to the Director's stake in the Board's decisions:

The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

But we do not think that these duties provide the requisite stake. They do not confer upon the Director any specific interest in the proper administration of the Act.

In *United States ex rel. Chapman v. F. P. C.*, 191 F.2d 796, 799-800 (4 Cir. 1951), *rev'd*, 345 U.S. 153, 73 S.Ct. 609, 97 L.Ed. 918 (1953), we held that the Secretary of the Interior lacked standing to challenge an order granting a license to a private company to construct a dam. The Secretary claimed to be affected by the order because it was his statutory duty to market surplus electrical power

from publicly constructed dams. The Supreme Court reversed without opinion on this point, upholding standing. 345 U.S. at 156. See 3 K. Davis, *supra*, § 22.15 at 280.

The Director asserts that *Chapman* supports his position before us, but we disagree. The Secretary of the Interior in *Chapman* did have some stake in the outcome: it would have been harder for him to market public power if another private dam was built. Alternatively, if the private project was disapproved, it would have been more likely that a public dam would eventually have been built, in which case the Secretary would have had more power to market. Thus, regardless of whether the Secretary was faced with a surplus or a shortage of electrical power to market under his statutory authority, the FPC's decision would directly affect him in the performance of his marketing obligations. The Director in this case has no such specific interest. Therefore, we read *Chapman* to suggest that the Director does not have a stake in the outcome and cannot be a party.

The lack of a stake in the outcome on the part of the Director would appear to end our inquiry. The Director argues, however, that because he is a party to proceedings before the Board, 20 C.F.R. § 801.2(10), it would be anomalous if he were not a party before this court. There are several answers to this argument. First, of course, that the Director is a party to proceedings before the Board does not alter the fact that he has no direct stake in the outcome of the case, is not a person aggrieved by Board action and is thus without a case or controversy to assert. Second, the fact that one is permitted to be a party to administrative proceedings does not require that one be

entitled to initiate judicial review of those proceedings:<sup>5</sup> in the former case, the participant may perform a useful role by calling to the administrative agency's attention considerations it could not on its own initiative, much in the way that an intervenor would in this court; in the latter situation, however, the hopeful party is seeking to initiate a new level of proceedings because of dissatisfaction with the result below. See 3 K. Davis, *supra*, § 22.08 at 242.

Finally, it would appear even from the regulations implementing the Act that the Director is not *automatically* to be a party in this court, even though he is automatically a party before the Board. In 20 C.F.R. § 801.2(10), "party" is defined as follows: "the Secretary or his designee *and* any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken." (Emphasis

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<sup>5</sup> While the Director here seeks to be named a *respondent* to a petition for review, a holding that he is a "person aggrieved" whose presence insures proper adversity would necessarily lead to the conclusion that he is entitled to petition for review of a decision of the Benefits Review Board of which he disapproves: if the Director has an interest in sustaining a Board decision with which he agrees, then he also has an interest in overturning a decision with which he disagrees. We would not readily subject the LHWCA to a construction under which the official charged with administering the Act could invoke the aid of the federal courts to reverse the decision of the board responsible for adjudicating claims under the Act. The unfairness of such a result is manifest if one contemplates the possibility that in some future case the Director, in furtherance of his asserted interest in determining "the proper scope of coverage of the Act," might seek to reverse an award to a claimant on the ground that the Board had been too generous.



added.) However, 20 C.F.R. § 802.410 provides: "any party adversely affected or aggrieved by such decision [of the Board] may take an appeal to the U.S. Court of Appeals . . . ." (Emphasis added.) Thus, the Secretary is a "party" before the Board even if he is not "aggrieved"; but to be entitled to participate in court proceedings, the Secretary, although a "party" below, must, like any other "party," be adversely affected.

In summary, we stand firm in our conclusion that the Director is not automatically a respondent in a review proceeding under § 921(c).

In our earlier opinion, we added that we did not decide that "a court of appeals may not, in a proper case, permit intervention by others [including the Director] who have an interest at stake . . . ." We elaborate on that comment: The Director unquestionably has a right to seek to intervene under Rule 24(b) Fed.R.Civ.P.,<sup>6</sup> and an application will ordinarily be granted. *See* 3B J. Moore, *Federal Practice* ¶ 24.10[5]; 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1912. The Director has not, however, sought intervention in these cases. We assume that he has not done so because he does not wish to render moot his assertion that such a request on his part is unnecessary. Having decided that such a request is necessary, we will still consider such a request on his part should he be advised to make it.

<sup>6</sup> The Federal Rules of Civil Procedure principally govern procedure in the United States district courts in suits of a civil nature, Rule 1, but Rule 81(c) makes them applicable also to review proceedings under the Act to the extent that the Act does not prescribe procedure.

*Nos. 75-1051 and 75-1088 - REVERSED.*

*Nos. 75-1075 and 75-1196 - AFFIRMED. Each Party to Pay His Own Costs.*

BUTZNER, Circuit Judge (dissenting):

# I

I believe that the Director, Office of Workmen's Compensation Programs, should be recognized as a party to these proceedings. This issue raises a simple question of statutory construction. In 33 U.S.C. § 939(c), Congress authorized the Secretary of Labor to assist claimants and to provide them legal assistance. This statute must be read along with 33 U.S.C. § 921(a), which provides that attorneys appointed by the Secretary shall represent him before the courts of appeals. The Secretary has properly delegated his responsibilities to the Director.

Regulations under the Act establish the Director as a party before the Benefits Review Board. 20 C.F.R. § 801.3(10). His stake in the proceedings arises out of the duty imposed by 33 U.S.C. § 939(c)(1) to assist claimants. Thus, the Director, like any other party before the Board, is aggrieved within the meaning of 33 U.S.C. § 921(c) by an adverse decision of the Board. If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review. If the decision favors the claimant, the statute authorizes the Director to support the award on review.

In sum, the Act expressly places on the Secretary or his designee, the Director - not upon the courts of appeals - the responsibility of determining when the

Director should participate in the review of the Board's orders. Congress did not condition the Director's appearance in our court on our granting or withholding permission.

The difference between the Director's status as a permissive intervenor and as a party is more than a technical nicety. The majority rule, as I see it, will create roadblocks to filing petitions for review and certiorari, and it will provoke extended litigation over whether the Director's position in a given case satisfies the requirements of Rule 24(b). Other circuits have wisely recognized the Director's status as a party. *See, e. g., Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976); *McCord v. Cephas*, 532 F.2d 1377 (D.C.Cir. 1975). I am not persuaded that we should differ from their sound conclusions.

## II

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history. *See I. T. O. Corp. v. Benefits Review Board*, 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting). I add only these brief observations. A careful study of the majority opinion filed when this case was heard by a panel, *I. T. O. Corp.*, 529 F.2d at 1081, discloses that the effect of the point of rest theory is to deprive longshoremen of coverage under the Act when they are injured while stuffing or stripping a ship's containers at a marine terminal. The

slight modification of the theory in the majority's per curiam opinion alleviates some, but not all, of its harsh results. It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult.

Judge CRAVEN initially voted with the majority to deny the Director standing as a party to these proceedings. On en banc reconsideration, he is now persuaded otherwise, and concurs in Judge BUTZNER'S opinion.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, DEPARTMENT OF LABOR, Petitioner

v

NEWPORT NEWS SHIPBUILDING AND DRY DOCK  
COMPANY, et al.

514 US \_\_\_, 131 L Ed 2d 160, 115 S Ct \_\_

[No. 93-1783]

Argued January 9, 1995. Decided March 21, 1995.

**Decision:** Director of Office of Workers' Compensation Programs held to lack standing under Longshore and Harbor Workers' Compensation Act (33 USCS § 921(c)) to appeal Benefits Review Board order denying compensation claim.

#### APPEARANCES OF COUNSEL

**Beth S. Brinkmann** argued the cause for petitioner.

**Lawrence P. Postol** argued the cause for respondents.

#### SYLLABUS BY REPORTER OF DECISIONS

The Director of the Labor Department's Office of Workers' Compensation Programs petitioned the Court of Appeals for review of a Benefits Review Board decision that, *inter alia*, denied Jackie Harcum full-disability compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA). Harcum did not seek review and, while not opposing the Director's pursuit of the action, expressly declined to intervene on his own

behalf in response to an inquiry by the court. Acting *sua sponte*, the court concluded that the Director lacked standing to appeal the benefits denial because she was not "adversely affected or aggrieved" thereby within the meaning of § 21(c) of the Act, 33 USC § 921(c) [33 USC § 921(c)].

**Held:** The Director is not "adversely affected or aggrieved" under § 921(c).

(a) Section 921(c) does not apply to an agency acting as a regulator or administrator under the statute. This is strongly suggested by the fact that, despite long use of the phrase "adversely affected or aggrieved" as a term of art to designate those who have standing to appeal a federal agency decision, no case has held that an agency, without benefit of specific authorization to appeal, falls within that designation; by the fact that the United States Code's general judicial review provision, 5 USC § 551(2) [5 USC § 551(2)], which employs the phrase "adversely affected or aggrieved," specifically excludes agencies from the category of persons covered; and by the clear evidence in the Code that when an agency in its governmental capacity is meant to have standing, Congress says so, see, *e.g.*, 29 USC §§ 660(a) and (b) [29 USCS §§ 660(a) and (b)]. While the text of a particular statute could make clear that "adversely affected or aggrieved" is being used in a peculiar sense, the Director points to no such text in the LHWCA.

(b) Neither of the categories of interest asserted by the Director demonstrates that "adversely affected or aggrieved" in this statute must have an extraordinary meaning. The Director's interest in ensuring adequate

payments to claimants is insufficient. Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes; absent some clear and distinctive responsibility conferred upon the agency, an "adversely affected or aggrieved" judicial review provision leaves private interests (even those favored by public policy) to be vindicated by private parties. *Heckman v United States*, 224 US 413, 56 L Ed 820, 32 S Ct 424; *Moe v Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 US 463, 48 L Ed 2d 96, 96 S Ct 1634; *Pasadena City Bd. of Ed. v Spangler*, 427 US 424, 49 L Ed 2d 599, 96 S Ct 2697, 49 L Ed 2d 599; and *General Telephone Co. of Northwest v EEOC*, 446 US 318, 64 L Ed 2d 319, 100 S Ct 1698, distinguished. Also insufficient is the Director's asserted interest in fulfilling important administrative and enforcement responsibilities. She fails to identify any specific statutory duties that an erroneous Board ruling interferes with, reciting instead conjectural harms to abstract and remote concerns.

8 F.3d 175, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment.

## OPINION OF THE COURT

Justice SCALIA delivered the opinion of the Court.

The question before us in this case is whether the Director of the Office of Workers' Compensation Programs in the United States Department of Labor has standing under § 921(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424, as amended, 33 USC § 901 *et seq.* [33 USCS §§ 901 *et seq.*], to seek judicial review of decisions by the Benefits Review Board that in the Director's view deny claimants compensation to which they are entitled.

### I

On October 24, 1984, Jackie Harcum, an employee of respondent Newport News Shipbuilding and Dry Dock Co., was working in the bilge of a steam barge when a piece of metal grating fell and struck him in the lower back. His injury required surgery to remove a herniated disc, and caused prolonged disability. Respondent paid Harcum benefits under the LHWCA until he returned to light-duty work in April 1987. In November 1987, Harcum returned to his regular department under medical restrictions. He proved unable to perform essential tasks, however, and the company terminated his employment in May 1988. Harcum ultimately found work elsewhere, and started his new job in February 1989.

Harcum filed a claim for further benefits under the LHWCA. Respondent contested the claim, and the dispute was referred to an Administrative Law Judge (ALJ). One of the issues was whether Harcum was entitled to



benefits for total disability, or instead only for partial disability, from the date he stopped work for respondent until he began his new job. "Disability" under the LHWCA means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 USC § 902(10) [33 USCS § 902(10)].

After a hearing on October 20, 1989, the ALJ determined that Harcum was partially, rather than totally, disabled when he left respondent's employ, and that he was therefore owed only partial-disability benefits for the interval of his unemployment. On appeal, the Benefits Review Board affirmed the ALJ's judgment, and also ruled that under 33 USC § 908(f) [33 USCS §§ 908(f)], the company was entitled to cease payments to Harcum after 104 weeks, after which time the LHWCA special fund would be liable for disbursements pursuant to § 944.

The Director petitioned the United States Court of Appeals for the Fourth Circuit for review of both aspects of the Board's ruling. Harcum did not seek review and, while not opposing the Director's pursuit of the action, expressly declined to intervene on his own behalf in response to an inquiry by the Court of Appeals. The Court of Appeals *sua sponte* raised the question whether the Director had standing to appeal the Board's order. 8 F.3d 175 (1993). It concluded that she did not have standing with regard to that aspect of the order denying Harcum's claim for full-disability compensation, since she was not "adversely affected or aggrieved" by that decision within the meaning of § 921(c) of the Act, 33

USC § 921(c) [33 USCS § 921(c)].<sup>1</sup> We granted the Director's petition for certiorari. 512 US \_\_\_, 129 L Ed 2d 936, 115 S Ct 41 (1994).

## II

The LHWCA provides for compensation of workers injured or killed while employed on the navigable waters or adjoining, shipping-related land areas of the United States. 33 USC § 903 [33 USCS § 903]. With the exception of those duties imposed by §§ 919(d), 921(b), and 941, the Secretary of Labor has delegated all responsibilities of the Department with respect to administration of the LHWCA to the Director of the Office of Workers' Compensation Programs (OWCP). 20 CFR §§ 701.201 and 701.202 (1994); 52 Fed Reg 48466 (1987). For ease of exposition, the Director will hereinafter be referred to as the statutory recipient of those responsibilities.

A worker seeking compensation under the Act must file a claim with an OWCP district director. 33 USC § 919(a) [33 USCS § 919(a)]; 20 CFR §§ 701.301(a) and 702.105 (1994). If the district director cannot resolve the claim informally, 20 CFR § 702.311, it is referred to an ALJ authorized to issue a compensation order, § 702.316; 33 USC § 919(d) [33 USCS § 919(d)]. The ALJ's decision is reviewable by the Benefits Review Board, whose members are appointed by the Secretary. § 921(b)(1). The

<sup>1</sup> The court found that, as administrator of the § 944 special fund, the Director did have standing to appeal the Board's decision to grant respondent relief under § 908(f). That ruling is not before us and we express no view upon it.

Board's decision is in turn appealable to a United States court of appeals, at the instance of "[a]ny person adversely affected or aggrieved by" the Board's order. § 921(c).

With regard to claims that proceed to ALJ hearings, the Act does not by its terms make the Director a party to the proceedings, or grant her authority to prosecute appeals to the Board, or thence to the federal court of appeals. The Director argues that she nonetheless had standing to petition the Fourth Circuit for review of the Board's order, because she is "a person adversely affected or aggrieved" under § 921(c). Specifically, she contends the Board's decision injures her because it impairs her ability to achieve the Act's purposes and to perform the administrative duties the Act prescribes.

The phrase "person adversely affected or aggrieved" is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts. *See, e.g.*, federal Communications Act of 1934, 47 USC § 402(b)(6) [47 USCS § 402(b)(6)]; Occupational Safety and Health Act of 1970, 29 USC § 660(a) [29 USCS § 660(a)]; Federal Mine Safety and Health Act of 1977, 30 USC § 816 [30 USCS § 816]. The terms "adversely affected" and "aggrieved," alone or in combination, have a long history in federal administrative law, dating back at least to the federal Communications Act of 1934, § 402(b)(2) (codified, as amended, 47 USC § 402(b)(6) [47 USCS § 402(b)(6)]). They were already familiar terms in 1946, when they were embodied within the judicial review provision of the Administrative Procedure Act (APA), 5 USC § 702 [5 USCS § 702], which entitles "[a] person . . . adversely affected or aggrieved by agency action within

the meaning of a relevant statute" to judicial review. In that provision, the qualification "within the meaning of a relevant statute" is not an addition to what "adversely affected or aggrieved" alone conveys; but is rather an acknowledgment of the fact that what *constitutes* adverse effect or aggrievement varies from statute to statute. As the US Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act (1947) put it, "The determination of who is 'adversely affected or aggrieved . . . within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' " *Id.*, at 96 (citation omitted). We have thus interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the "zone of interests to be protected or regulated by the statute" in question. *Association of Data Processing Service Organizations, Inc. v Camp*, 397 US 150, 153, 25 L Ed 2d 184, 90 S Ct 827 (1970); *see also Clarke v Securities Industry Assn.*, 479 US 388, 395-396, 93 L Ed 2d 757, 107 S Ct 750 (1987).

Given the long lineage of the text in question, it is significant that counsel have cited to us no case, neither in this Court nor in the courts of appeals, neither under the APA nor under individual statutory-review provisions such as the present one, which holds that, without benefit of specific authorization to appeal, an agency, in its regulatory or policy-making capacity, is "adversely affected" or "aggrieved." *Cf. Director, Office of Workers' Compensation Programs v Perini North River Associates*, 459



US 297, 302-305, 74 L Ed 2d 465, 103 S Ct 634 (1983) (noting the issue of whether the Director has standing under § 921(c), but finding it unnecessary to reach the question).<sup>2</sup> There are cases in which an agency has been held to be adversely affected or aggrieved in what might be called its nongovernmental capacity – that is, in its capacity as a member of the market group that the statute was meant to protect. For example, in *United States v ICC*, 337 US 426, 93 L Ed 1451, 69 S Ct 1410 (1949), we held that the United States had standing to sue the Interstate Commerce Commission in federal court to overturn a Commission order that denied the Government recovery of damages for an allegedly unlawful railroad rate. The Government, we said, “is not less entitled than any other shipper to invoke administrative and judicial protection.”

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<sup>2</sup> In addition to not reaching the § 921(c) question, Perini also took as a given (because it had been conceded below) the answer to another question: whether the Director (rather than the Benefits Review Board) is the proper party respondent to an appeal from the Board’s determination. See 459 U.S., at 304, n 13, 74 L Ed 2d 465, 103 S Ct 634. Obviously, an agency’s entitlement to party respondent status does not necessarily imply that agency’s standing to appeal: The National Labor Relations Board, for example, is always the party respondent to an employer or employee appeal, but cannot initiate an appeal from its own determination. 29 USC §§ 152(1), 160(f) [29 USCS § 152(1) 160(f)]. Indeed, it can be argued, as an *amicus* in this case has done, that if the Director is the proper party respondent in the court of appeals (as her regulations assert, see 20 CFR § 802.410 (1994)), in initiating an appeal she would end up on both sides of the case. See Brief for Nat. Assn. of Waterfront Employers et al. as *Amici Curiae* 17, n 14. Our opinion today intimates no view on the party-respondent question.

*Id.*, at 430, 93 L Ed 1451, 69 S Ct 1410.<sup>3</sup> But the status of the Government as a statutory beneficiary or market participant must be sharply distinguished from the status of the Government as regulator or administrator.

The latter status would be at issue if – to use an example that continues the ICC analogy – the Environmental Protection Agency sued to overturn an ICC order establishing high tariffs for the transportation of recyclable materials. Cf. *United States v Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 US 669, 37 L Ed 2d 254, 93 S Ct 2405 (1973). Or if the Department of Transportation, to further a policy of encouraging so-called “telecommuting” in order to reduce traffic congestion, sued as a “party aggrieved” under 28 USC § 2344 [28

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<sup>3</sup> *United States v ICC* accorded the United States standing despite the facts that (1) the Interstate Commerce Act contained no specific judicial review provision, and (2) the APA’s general judicial review provision (“person adversely affected or aggrieved”) excludes agencies from the definition of “person.” See *infra*, at \_\_\_, 131 L Ed 2d, at 169. It would thus appear that an agency suing in what might be termed a nongovernmental capacity escapes that definitional limitation. The LHWCA likewise contains a definition of “person” that does not specifically include agencies. 33 USC § 902(1) [33 USCS § 902(1)]. We chose not to rely upon that provision in this opinion because it seemed more likely to sweep in the question of the Director’s authority to appeal Board rulings that are adverse to the § 944 special fund, which deserves separate attention. It is possible that the Director’s status as manager of the privately financed fund removes her from the “person” limitation, just as it may remove her from the more general limitation that agencies *qua* agencies are not “adversely affected or aggrieved.” We leave those issues to be resolved in a case where the Director’s relationship to the fund is immediately before us.

USCS § 2344], to reverse the Federal Communications Commission's approval of rate increases on second phone lines used for modems. We are aware of no case in which such a "policy interest" by an agency has sufficed to confer standing under an "adversely affected or aggrieved" statute or any other general review provision. To acknowledge the general adequacy of such an interest would put the federal courts into the regular business of deciding intrabrand and intraagency policy disputes – a role that would be most inappropriate.

That an agency in its governmental capacity is not "adversely affected or aggrieved" is strongly suggested, as well, by two aspects of the United States Code: First, the fact that the Code's general judicial review provision, contained in the APA, does not include agencies within the category of "person adversely affected or aggrieved." See 5 USC § 551(2) [5 USCS § 551(2)] (excepting agencies from the definition of "person"). Since, as we suggested in *United States v ICC*, the APA provision reflects "the general legislative pattern of administrative and judicial relationships," 337 US, at 433-434, 93 L Ed 1451, 69 S Ct 1410, it indicates that even under specific "adversely affected or aggrieved" statutes (there were a number extant when the APA was adopted) agencies as such normally do not have standing. And second, the United States Code displays throughout that when an agency in its governmental capacity is meant to have standing, Congress says so. The LHWCA's silence regarding the Secretary's ability to take an appeal is significant when laid beside other provisions of law. See, e.g., Black Lung Benefits Act (BLBA), 30 USC § 932(k) [30 USCS § 932(k)] ("The Secretary shall be a party in any proceeding relative to [a]

claim for benefits"); Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-5(f)(1) [42 USCS § 2000e-5(f)(1)] (authorizing the Attorney General to initiate civil actions against private employers) and § 2000e-4(g)(6) (authorizing the Equal Employment Opportunities Commission to "intervene in a civil action brought . . . by an aggrieved party . . ."); Employee Retirement Income Security Act of 1974 (ERISA), 29 USC § 1132(a)(2) [29 USCS § 1132(a)(2).] (granting Secretary power to initiate various civil actions under the Act). It is particularly illuminating to compare the LHWCA with the Occupational Safety and Health Act of 1970 (OSHA), 29 USC § 651 *et seq.* [29 USCS §§ 651 *et seq.*]. Section 660(a) of OSHA is virtually identical to § 921(c): it allows "[a]ny person adversely affected or aggrieved" by an order of the Occupational Safety and Health Review Commission (a body distinct from the Secretary, as the Benefits Review Board is) to petition for review in the courts of appeals. OSHA, however, further contains a § 660(b), which expressly grants such petitioning authority to the Secretary – suggesting, of course, that the Secretary would *not* be considered "adversely affected or aggrieved" under § 660(a), and should not be considered so under § 921(c).

All of the foregoing indicates that the phrase "person adversely affected or aggrieved" does not refer to an agency acting in its governmental capacity. Of course the text of a particular statute could make clear that the phrase is being used in a peculiar sense. But the Director points to no such text in the LHWCA, and relies solely upon the mere existence and impairment of her governmental interest. If that alone could ever suffice to contradict the normal meaning of the phrase (which is



doubtful), it would have to be an interest of an extraordinary nature, extraordinarily impaired. As we proceed to discuss, that is not present here.

### III

The LHWCA assigns four broad areas of responsibility to the Director: (1) supervising, administering, and making rules and regulations for calculation of benefits and processing of claims, 33 USC §§ 906, 908-910, 914, 919, 930, and 939 (2) [33 USCS § 906, 908-910, 914, 919, 930 ad 939(2)] supervising, administering, and making rules and regulations for provision of medical care to covered workers, § 907; (3) assisting claimants with processing claims and receiving medical and vocational rehabilitation, § 939(c); and (4) enforcing compensation orders and administering payments to and disbursements from the special fund established by the Act for the payment of certain benefits, §§ 921(d) and 944. The Director does not assert that the Board's decision hampers her performance of these express statutory responsibilities. She claims only two categories of interest that are affected, neither of which remotely suggests that she has authority to appeal Board determinations.

First, the Director claims that because the LHWCA "has many of the elements of social insurance, and as such is designed to promote the public interest," Brief for Petitioner 17, she has standing to "advance in federal court the public interest in ensuring adequate compensation payments to claimants," *id.*, at 18. It is doubtful, to begin with, that the goal of the LHWCA is simply the support of disabled workers. In fact, we have said that,

because "the LHWCA represents a compromise between the competing interests of disabled laborers and their employers," it "is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities." *Potomac Electric Power Co. v Director, Office of Workers' Compensation Programs*, 449 US 268, 282, 66 L Ed 2d 446, 101 S Ct 509 (1980). The LHWCA is a scheme for fair and efficient resolution of a class of private disputes, managed and arbitrated by the Government. It represents a "quid pro quo between employer and employee. Employers relinquish certain legal rights which the law affords to them and so, in turn, do the employees." 1 M. Norris, *The Law of Maritime Personal Injuries* § 4.1, p 106 (4th ed 1990) (emphasis added).

But even assuming the single-minded, compensate-the-employee goal that the Director posits, there is nothing to suggest that the Director has been given authority to pursue that goal in the courts. Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes. The Interior Department, being charged with the duty to "protect persons and property within areas of the National Park System," 16 USC § 1a-6(a) [16 USCS § 1a-6(a)], does not thereby have authority to intervene in suits for assault brought by campers; or (more precisely) to bring a suit for assault when the camper declines to do so. What the Director must establish here is such a clear and distinctive responsibility for employee compensation as to overcome the universal assumption that "person adversely affected or aggrieved" leaves private interests (even those favored by public policy) to be litigated by private parties. That we are unable to find. The Director is not the designated

champion of employees within this statutory scheme. To the contrary, one of her principal roles is to serve as the broker of informal settlements between employers and employees. 33 USC § 914(h) [33 USCS § 914(h)]. She is charged, moreover, with providing "information and assistance" regarding the program to *all* persons covered by the Act, including employers. §§ 902(1), 939(c). To be sure, she has discretion under § 939(c) to provide "legal assistance in processing a claim" if it is requested (a provision that is perhaps of little consequence, since the Act provides attorneys' fees to successful claimants, *see* § 928); but that authority, which is discretionary with her and contingent upon a request by the claimant, does not evidence the duty and power, when the claimant is satisfied with his award, to contest the award on her own.

The Director argues that her standing to pursue the public's interest in adequate compensation of claimants is supported by our decisions in *Heckman v United States*, 224 US 413, 56 L Ed 820, 32 S Ct 424 (1912), *Moe v Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 US 463, 48 L Ed 2d 96, 96 S Ct 1634 (1976), *Pasadena City Bd. of Ed. v Spangler*, 427 US 424, 49 L Ed 2d 599, 96 S Ct 2697 (1976), and *General Telephone Co. of Northwest v EEOC*, 446 US 318, 64 L Ed 2d 319, 100 S Ct 1698 (1980). Brief for Petitioner 18. None of those cases is apposite. *Heckman* and *Moe* pertain to the United States' standing to represent the interests of Indians; the former holds, *see* 224 US, at 437, 56 L Ed 820, 32 S Ct 424, and the latter indicates in dictum, *see* 425 US, at 474, n 13, 48 L Ed 2d 96, 96 S Ct 1634, that the Government's status as guardian confers standing. The third case, *Spangler, supra*, at 427, 49 L Ed 2d 599, 96 S Ct 2697, based standing of the

United States upon an explicit provision of Title IX of the Civil Rights Act authorizing suit, 42 USC § 2000h-2 [42 USCS § 2000h-2], and the last, *General Telephone Co., supra*, at 325, 64 L Ed 2d 319, 100 S Ct 1698, based standing of the Equal Employment Opportunity Commission upon a specific provision of Title VII of the Civil Rights Act authorizing suit, 42 USC § 2000e-5(f)(1) [42 USCS § 2000e-5(f)(1)]. Those two cases certainly establish that Congress *could* have conferred standing upon the Director without infringing Article III of the Constitution; but they do not at all establish that Congress did so. In fact, *General Telephone Co.* suggests just the opposite, since it describes how, prior to the 1972 amendment specifically giving the EEOC authority to sue, only the "aggrieved person" could bring suit, *even though* the EEOC *was* authorized to use " 'informal methods of conference, conciliation, and persuasion' " to eliminate unlawful employment practices, 446 US, at 325, 64 L Ed 2d 319, 100 S Ct 1698 – an authority similar to the Director's informal settlement authority here.

The second category of interest claimed to be affected by erroneous Board rulings is the Director's ability to fulfill "important administrative and enforcement responsibilities." Brief for Petitioner 18. The Director fails, however, to identify any specific statutory duties that an erroneous Board ruling interferes with, reciting instead conjectural harms to abstract and remote concerns. She contends, for example, that "incorrect claim determinations by the Board frustrate [her] duty to administer and enforce the statutory scheme in a uniform manner." *Id.*, at 18-19. But it is impossible to understand how a duty of uniform *administration and enforcement* by



the Director (presumably arising out of the prohibition of arbitrary action reflected in 5 USC § 706) [5 USCS § 706] hinges upon correct *adjudication* by someone else. The Director does not (and we think cannot) explain, for example, how an erroneous decision by the Board affects her ability to process the underlying claim, § 919, provide information and assistance regarding coverage, compensation, and procedures, § 939(c), enforce the final award, § 921(d), or perform any other required task in a "uniform" manner.

If the correctness of adjudications were essential to the Director's performance of her assigned duties, Congress would presumably have done what it has done with many other agencies: made adjudication *her* responsibility. In fact, however, it has taken pains to *remove* adjudication from her realm. The LHWCA Amendments of 1972, 86 Stat. 1251, assigned administration to the Director, 33 USC § 939(a) [33 USCS § 939(a)]; assigned initial adjudication to ALJ's, § 919(d); and created the Board to consider appeals from ALJ's, § 921. The assertion that proper adjudication is essential to proper performance of the Director's functions is quite simply contrary to the whole structure of the Act. To make an implausible argument even worse, the Director must acknowledge that her lack of control over the adjudicative process does not even deprive her of the power to resolve legal ambiguities in the statute. She retains the rulemaking power, *see* § 939(a), which means that if her problem with the present decision of the Board is that it has established an erroneous rule of law, *see Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, 467 US 837, 81 L Ed 2d 694, 104 S Ct 2778 (1984), she has full power to alter that rule.

*See Estate of Cowart v Nicklos Drilling Co.*, 505 US \_\_\_, \_\_\_, 120 L Ed 2d 379, 112 S Ct 258 (1992) ("The [Board] is not entitled to any special deference"). Her only possible complaint, then, is that she does not agree with the outcome of this particular case. The Director also claims that precluding her from seeking review of erroneous Board rulings "would reduce the incentive for employers to view the Director's informal resolution efforts as authoritative, because the employer could proceed to a higher level of review from which the Director could not appeal." Brief for Petitioner 19. This argument assumes that her informal resolution efforts are *supposed* to be "authoritative." We doubt that. The structure of the statute suggests that they are supposed to be facilitative – a service to both parties, rather than an imposition upon either of them. But even if the opposite were true, we doubt that the unlikely prospect that the Director will appeal *when the claimant does not* will have much of an impact upon whether the employer chooses to spurn the Director's settlement proposal and roll the dice before the Board. The statutory requirement of adverse effect or aggrievement must be based upon "something more than an ingenious academic exercise in the conceivable." *United States v SCRAP*, 412 US, at 688, 37 L Ed 2 254, 93 S Ct 2405.

The Director seeks to derive support for her position from Congress' later enactment of the BLBA in 1978, but it seems to us that the BLBA militates precisely *against* her position. The BLBA expressly provides that "[t]he Secretary shall be a party in any proceeding relative to a claim for benefits under this part." 30 USC § 932(k) [30

USCS § 932(k)]. The Director argues that since the Secretary is explicitly made a party under the BLBA, she must be meant to be a party under the LHWCA as well. That is not a form of reasoning we are familiar with. The normal conclusion one would derive from putting these statutes side by side is this: when, in a legislative scheme of this sort, Congress wants the Secretary to have standing, it says so.

Finally, the Director retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes, see, e.g., *Northeast Marine Terminal Co. v Caputo*, 432 US 249, 268, 53 L Ed 2d 320, 97 S Ct 2348 (1977). That principle may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory "purposes" more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two. Construing the LHWCA as liberally as can be, we cannot find that the Director is "adversely affected or aggrieved" within the meaning of § 921(c).

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For these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

So ordered.

## SEPARATE OPINION

Justice **Ginsburg**, concurring in the judgment.

The Court holds that the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (OWCP) lacks standing under § 921(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 USC § 901 *et seq.* [33 USCS §§ 901 *et seq.*], to seek judicial review of LHWCA claim determinations. Before amendment of the LHWCA in 1972, the Act's administrator had authority to seek review of LHWCA claim determinations in the courts of appeals. The Court reads the 1972 amendments as divesting the Act's administrator of access to federal appellate tribunals formerly open to the administrator's petitions. The practical effect of the Court's ruling is to order a disparity between two compensatory schemes – the LHWCA and the Black Lung Benefits Act (BLBA), 83 Stat. 792, as amended, 30 USC § 901 *et seq.* [30 USCS §§ 901 *et seq.*] – measures that Congress intended to work in essentially the same way.

Significantly, however, the Court observes that our precedent "certainly establish[es] that Congress *could* have conferred standing upon the [OWCP] Director without infringing Article III of the Constitution." *Ante*, at \_\_\_, 131 L Ed 2d, at 172 (emphasis retained).<sup>1</sup> While I do not

<sup>1</sup> In contrast, the Court of Appeals for the Fourth Circuit raised the standing issue in this case on its own motion because it feared that judicial review initiated by the Director would "stri[k]e at the core of the constitutional limitations placed upon th[e] court by Article III of the Constitution." 8 F.3d 175, 180, n 1 (1993); see also *Director, OWCP v Perini North River Associates*,



challenge the Court's conclusion that the Director lacks standing under the amended Act, I write separately because I am convinced that Congress did not advert to the change – the withdrawal of the LHWCA administrator's access to judicial review – wrought by the 1972 LHWCA amendments. Since no Article III impediment stands in its way, Congress may speak the final word by determining whether and how to correct its apparent oversight.

## I

Before the 1972 amendments to the LHWCA, the OWCP Director's predecessors as administrators of the Act, officials called OWCP deputy commissioners, adjudicated LHWCA claims in the first instance. 33 USC §§ 919, 923 (1970 ed) [33 USCS § 919, 923]; see *Kalaris v Donovan*, 697 F 2d 376, 381-382 (CA DC, cert. denied, 462 US 1119, 77 L Ed 2d 1349, 103 S Ct 3088 (1983)). A deputy commissioner's claim determination could be challenged in federal district court in an injunctive action against the deputy commissioner. 33 USC § 921(b) (1970 ed) [33 USCS § 921(b)]; see *Parker v Motor Boat Sales, Inc.*, 314 US 244, 245, 86 L Ed 184, 62 S Ct 221 (1941). As a defending party in district courts, the deputy commissioner could appeal adverse rulings to the courts of appeals pursuant to 28 USC § 1291 [28 USCS § 1291], even when no other party sought appeal. See *Henderson v Glens Falls Indemnity Co.*, 134 F 2d 320, 322 (CA 5 1943) ("There are numerous cases

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459 US 297, 302-305, 74 L Ed 2d 465, 103 S Ct 634 (1983) (noting but not deciding Article III issue).

in which the deputy commissioner has appealed as the sole party, and his right to appeal has never been questioned.") (citing, *inter alia*, *Parker*, *supra*).

The 1972 LHWCA amendments shifted the deputy commissioners' adjudicatory authority to Department of Labor administrative law judges (ALJs). Although district directors – as deputy commissioners are now called<sup>2</sup> – are empowered to investigate LHWCA claims and attempt to resolve them informally, they must order a hearing before an ALJ upon a party's request. 33 USC § 919 [33 USCS § 919]. The 1972 amendments also replaced district court injunctive actions with appeals to the newly created Benefits Review Board. Just as the deputy commissioners were parties before district courts prior to 1972, the Director – as the Secretary's delegate – is a party before the Benefits Review Board under the current scheme. 20 CFR § 801.2(a)(10) (1994). Either the Director or another party may invoke Board review of an ALJ's decision. 33 USC § 921(b)(3) [33 USCS § 921(b)(3)]; 20 CFR §§ 801.102, 801.2(a)(10) (1994). As before the amendments, further review is available in the courts of appeals. 33 USC § 921(c) [33 USCS § 921(c)].

The Court holds that the LHWCA, as amended in 1972, does not entitle the Director to appeal Benefits Review Board decisions to the courts of appeals. Congress surely decided to transfer adjudicative functions from the deputy commissioners to ALJs, and from the district courts to the Benefits Review Board. But there is scant reason to believe that Congress consciously decided

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<sup>2</sup> 20 CFR §§ 701.301(a)(7), 702.105 (1994).

to strip the Act's administrator of authority that official once had to seek judicial review of claim determinations adverse to the administrator's position. In amending the LHWCA in 1972, Congress did not expressly address the standing of the Secretary of Labor or his delegate to petition for judicial review. Congress did use the standard phrase "person adversely affected or aggrieved" to describe proper petitioners to the courts of appeals. See 33 USC § 921(c) [33 USCS § 921(c)]. But it is doubtful that Congress comprehended the full impact of that phrase: Not only does it qualify employers and injured workers to seek judicial review but, as interpreted, it ordinarily disqualifies agencies acting in a governmental capacity from petitioning for court review.<sup>3</sup>

## II

Congress' 1978 revision of the Black Lung Benefits Act (BLBA) reveals the judicial review design Congress ordered when it consciously attended to this matter. The 1978 BLBA amendments were adopted, in part, to keep adjudication of BLBA claims under the same procedural regime as the one Congress devised for LHWCA claims. In the 1978 BLBA prescriptions, Congress expressly provided for the party status of the OWCP Director. See 30 USC § 932(k) [30 USCS § 932(k)] ("The Secretary [of

<sup>3</sup> The law-presentation role OWCP's Director seeks to play might be compared with the role of an advocate general or *ministere public* in civil law proceedings. See generally M. Glendon, M. Gordon, & C. Osakwe, *Comparative Legal Traditions* 344 (2d ed. 1994); R. David, *French Law* 59 (1972).

Labor] shall be a party in any proceeding relative to a claim for [black lung] benefits.").

Congress enacted the BLBA in 1969 to afford compensation to coal miners and their survivors for death or disability caused by pneumoconiosis (black lung disease). See *Usery v Turner Elkhorn Mining Co.*, 428 US 1, 8, 49 L Ed 2d 752, 96 S Ct 2882 (1976). The BLBA generally adopts the claims adjudication scheme of the LHWCA. 30 USC § 932(a) [30 USCS § 932(a)]. Congress amended the BLBA in 1978 to clarify that the BLBA *continuously* incorporates LHWCA claim adjudication procedures. See § 7(a)(1), 92 Stat. 98 (amending BLBA to incorporate LHWCA "as it may be amended from time to time"); S.Rep. No. 95-209, p 18 (1977) (BLBA amendment "makes clear that any and all amendments to the [LHWCA]" are incorporated by the BLBA, including "the 1972 amendments relating to the use of Administrative Law Judges in claims adjudication").

In the context of assuring automatic application of LHWCA procedures to black lung claims, see H.R.Conf.Rep. No. 95-864, pp. 22-23 (1978), Congress added to the BLBA the provision for the Secretary of Labor's party status "in any proceeding relative to a claim for [black lung] benefits." See § 7(k), 92 Stat. 99. According to the Report of the Senate Committee on Human Resources:

"Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the amended [LHWCA] confere[r] standing upon the Secretary of Labor or his designee to appear, present evidence, file appeals or respond to appeals filed with respect to the litigation and



appeal of claims. In establishing the [LHWCA] procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. The Secretary's interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the [BLBA] should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for the enforcement of the [BLBA], to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board, and appropriate United States Courts." S.Rep. No. 95-209, *supra*, at 21-22 (emphasis added).

Even if this passage cannot force an uncommon reading of the LHWCA words "person adversely affected or aggrieved," see *ante*, at \_\_\_, 131 L Ed 2d, at 170, it strongly indicates that Congress considered vital to sound administration of the Act the administrator's access to court review.

The Director has been a party before this Court in nine argued cases involving the LHWCA.<sup>4</sup> In two of these

<sup>4</sup> *Director, OWCP v Greenwich Collieries*, 512 US \_\_\_, 129 L Ed 2d 221, 114 S Ct 2251 (1994); *Bath Iron Works Corp. v Director, OWCP*, 506 US \_\_\_, 121 L Ed 2d 619, 113 S Ct 692 (1993); *Estate of Cowart v Nicklos Drilling Co.*, 505 US \_\_\_, 120 L Ed 2d 379, 112 S Ct 2589 (1992); *Morrison-Knudsen Construction Co. v Director, OWCP*, 461 US 624, 76 L Ed 2d 194, 103 S Ct 2045 (1983); *Director, OWCP v Perini North River Associates*, 459 US 297, 74 L Ed 2d 465, 103 S Ct 634 (1983); *U.S. Industries/Federal Sheet Metal, Inc. v Director, OWCP*, 455 US 608, 71 L Ed 2d 495, 102 S Ct 1312 (1982);

cases,<sup>5</sup> the Director was a petitioner in the court of appeals. As this string of cases indicates, the impact of the 1972 amendments on the Director's statutory standing generally escaped this Court's attention just as it apparently slipped from Congress' grasp.

### III

In addition to the BLBA, four other Federal Acts incorporate the LHWCA's claim adjudication procedures. See Defense Base Act, 42 USC § 1651 [42 USCS § 1651]; District of Columbia Workmen's Compensation Act, 36 D.C.Code Ann. § 501 (1973);<sup>6</sup> Outer Continental Shelf Lands Act, 43 USC § 1333(b) [43 USCS § 1333(b)]; Employees of Nonappropriated Fund Instrumentalities Statute, 5 USC § 8171 [5 USCS § 8171]. Claims under the LHWCA, the BLBA, and these other Acts are handled by the same administrative actors: the OWCP Director, district directors, ALJs, and the Benefits Review Board. Because the same procedures generally apply in the administration of these benefits programs, common

*Potomac Electric Power Co. v Director, OWCP*, 449 US 268, 66 L Ed 2d 446, 101 S Ct 509 (1980); *Director, OWCP v Rasmussen*, 440 US 29, 59 L Ed 2d 122, 99 S Ct 903 (1979); *Northeast Marine Terminal Co. v Caputo*, 432 US 249, 53 L Ed 2d 320, 97 S Ct 2348 (1977).

<sup>5</sup> *Morrison-Knudsen Construction Co.*, *supra*; *Rasmussen*, *supra*. In neither of these cases did the Board's ruling affect the § 944 special fund. See *ante*, at \_\_\_, n 3, 131 L Ed 2d, at 168-169.

<sup>6</sup> This law "applies to all claims for injuries or deaths based on employment events that occurred prior to July 2[4], 1982, the effective date of the District of Columbia Workers' Compensation Act [36 D.C.Code Ann. § 36-301 *et seq.* (1981)]." 20 CFR § 701.101(b) (1994).

issues arise under the several programs. See, e.g., *Director, OWCP v Greenwich Collieries*, 512 US \_\_\_, 129 L Ed 2d 221, 114 S Ct 2251 (1994) (invalidating "true doubt" burden of persuasion rule that Department of Labor ALJs applied in both LHWCA and BLBA claim adjudications).

Under the Court's holding, the Director can appeal the Benefits Review Board's resolution of a BLBA claim, but not the Board's resolution of an identical issue presented in a claim under the LHWCA or the other four Acts. I concur in the Court's judgment despite the disharmony it establishes and my conviction that Congress did not intend to put the administration of the BLBA and the LHWCA out of sync. Correcting a scrivener's error is within this Court's competence, see, e.g., *United States Nat. Bank of Ore. v Independent Ins. Agents of America, Inc.*, 508 US \_\_\_, 124 L Ed 2d 402, 113 S Ct 2173 (1993), but only Congress can correct larger oversights of the kind presented by the OWCP Director's petition.

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MAR 11 1996

No. 95-1081

CLERK

In The

# Supreme Court of the United States

October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN  
MUTUAL LIABILITY INSURANCE COMPANY, IN  
LIQUIDATION, BY AND THROUGH THE MISSISSIPPI  
INSURANCE GUARANTY ASSOCIATION,

*Petitioners,*

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, U.S. DEPARTMENT OF LABOR, AND  
MAGGIE YATES (Widow of Jefferson Yates),

*Respondents.*

*On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENT MAGGIE YATES

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## QUESTIONS PRESENTED

1. Is the wife (a "potential" widow) of an injured worker a "person entitled to compensation" under § 33(g) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") when she enters into third party tort settlements during the lifetime of her husband?

2. Does the Director of the Office of Workers' Compensation Programs have standing to respond to a Petition For Review of a Benefits Review Board decision pursuant to Fed. R. App. P. 15(a)?

3. Does § 33(f) of the LHWCA permit the Employer and Carrier to offset their liability for death benefits to a widow with third party tort recoveries of her adult, non-dependent children who did not file LHWCA death claims, had no legal standing to invoke the LHWCA, and are not "persons entitled to compensation"?

4. Do the release documents executed by the Claimant-widow and her adult, non-dependent six children in connection with post-death settlements clearly and unambiguously require the widow, Mrs. Yates, to give the Employer and Carrier a credit for the sums received by her adult, non-dependent six children?



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## STATEMENT OF THE CASE

For ease of reference, the Petitioners will be referred to as "Ingalls" or the "Employer". The Claimant-Respondent will be referred to as "Maggie Yates", "Mrs. Yates", or the "Respondent". The Respondent, Director of the Office of Workers' Compensation Programs, will be referred to as the "Director". The Administrative Law Judge and the Benefits Review Board will be referred to as the "ALJ" and the "BRB" or the "Board", respectively. Pursuant to Sup. Ct. R. 24.1(g), references to the Petitioners' Appendix will be by the designation (Pet. App.), and references to the Respondent's Appendix will be by the designation (Resp. App.). References to other portions of the record will be by the designation (R.), and references to testimony before the ALJ will be by the designation (Tr.). Exhibits will be referred to as (JX) or (Emp. Exh.).

Jefferson and Maggie Yates married in 1931. For approximately thirty years, they lived in George County, Mississippi. (Tr. 22). Mr. Yates worked for Ingalls as a shipfitter beginning in 1953. He ended his employment with Ingalls in September, 1967. Mr. Yates worked in other jobs until he voluntarily retired in 1974 at the age of sixty-seven. (R. 246).

On March 23, 1981, Mr. Yates was evaluated for asbestos-related diseases. On April 16, 1981, Mr. Yates filed a claim for disability benefits against Ingalls under the LHWCA. (R. 246; Pet. App. 61). On May 26, 1981, he filed a third-party tort action in the United States District Court for the Southern District of Mississippi, Southern Division, seeking damages against the manufacturers and sellers of asbestos products to which he was exposed while employed at Ingalls. (R. 247; Tr. 30; Pet. App. 61). Mrs. Yates was not a plaintiff in the third-party action. (Pet. App. 61).



Mr. Yates was diagnosed with asbestosis on April 17, 1981. He died on January 28, 1986. His death was caused in part by his asbestos exposure. (Pet. App. 59). On April 22, 1986, Maggie Yates, Mr. Yates' widow, filed a claim for death benefits under § 9 of the LHWCA. 33 U.S.C. § 909; (Pet. App. 63). At the time of Mr. Yates' death, none of the Yates' six (6) children were minors or dependent on Mr. Yates. None of the children filed claims for death benefits under the LHWCA. (R. 246; Tr. 37; Pet. App. 60, 63).

Before his death, Mr. Yates agreed to settlements with approximately eight third-party defendants (the "pre-death settlements"). Mrs. Yates joined in the settlements, which were made without obtaining Ingalls' prior written approval. (R. 247; Pet. App. 62-63). Releases were signed which released the third-party defendants from liability arising from Mr. Yates's exposure to asbestos. Some of the earlier third-party settlements limited the Claimant's release to loss of consortium. (R. 248; Pet. App. 63). Other settlements used language to foreclose the Claimant from bringing any future tort claim for the wrongful death of Mr. Yates. (R. 248; Pet. App. 63). None of the pre-death settlements foreclosed Ingalls from bringing its own claim under *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S. Ct. 1144, 22 L. Ed. 2d 371 (1969). (R. 248; Pet. App. 63).

Mr. Yates' LHWCA claim for disability benefits under § 8 of the Act was filed before his death, and was settled pursuant to § 8(i) of the Act on May 5, 1983 for a lump sum payment of \$15,000, open medical benefits, and an award of attorney's fees. (R. 245, 247; Pet. App. 62). The medical benefits referenced in this settlement amounted to \$454.15. Therefore, Ingalls' total liability for compensation and medical benefits to Mr. Yates was \$15,454.15. Hence, Ingalls' lien in the third-party suit was \$15,454.15. Ingalls had notice of the pre-death settlements, and asserted its lien. Ingalls was paid its compensation lien of \$15,454.15 in full. (R. 253; Pet. App. 62-63).

After Mr. Yates' death, Maggie Yates and her six children entered into three additional settlements with third-party tort defendants (the "post-death settlements"). At the hearing before the ALJ, Ingalls stipulated that the six adult Yates' children were not dependent on Mr. Yates at the time of his injury and death. (JX-1; Tr. 37; Pet. App. 60). Hence, none of the adult, non-dependent Yates' children filed a claim for death benefits under § 9 of the LHWCA, and none of them were entitled to benefits under the LHWCA. Ingalls gave written approval for each of the post-death settlements under § 33(g). Ingalls did not intervene in the third-party suit, and was not a signatory to the release documents. Ingalls asserts that in the post-death settlements, "Mrs. Yates and her adult children agreed that Ingalls would be entitled to a credit or offset in the entire amount of all sums received from the third-party defendants". (Pet. Cert. 4). However, the settlement documents, reasonably read and construed, do not clearly and unambiguously reflect an intent that Mrs. Yates agreed to do so.

The three post-death settlements were consummated with Raymark Industries, Inc. ("Raymark"), Wellington, and the Manville Trust. The Raymark settlement provides in part that:

... if any such claim<sup>1</sup> shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to any releasor shall first be given credit for the consideration paid to releasors under this agreement, less reasonable costs of

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1. A claim for workers' compensation benefits under the Mississippi Workers' Compensation Act or the LHWCA.

collection and shall make no payment of any compensation benefits to any releasor until the consideration paid to releasors under this agreement is exhausted.

(Resp. App. 3a-4a). Mrs. Yates signed an "acknowledgment" in connection with the Raymark settlement. The acknowledgment is part of an exhibit offered in evidence before the ALJ by Ingalls. (Resp. App. 7a; Emp. Exh. 21, p. 17). In the acknowledgment, Mrs. Yates stated her understanding that if she was successful in her claim for death benefits against Litton Systems, Inc.<sup>2</sup>, Litton (Ingalls) would be "given credit for the amount of money paid to me by Raymark" and that Litton would owe Mrs. Yates no further compensation "until the amount received by me from the above mentioned defendant has been exhausted. . . ." *Id.* (emphasis added).

The Fifth Circuit found the language of the Raymark release almost identical to the language "included in the other two instruments". *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 466 (5th Cir. 1995); (Pet. App. 16). The Wellington release provides:

. . . If any such claim<sup>3</sup> shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier . . . ordered to pay such compensation benefits shall first be given credit for the consideration paid to the

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2. Ingalls was then known as Litton Systems, Inc.

3. Again, a claim for workers' compensation benefits under the state act or the LHWCA.

undersigned under this agreement, less reasonable costs of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.

(Resp. App. 10a). The Wellington release provides that it will be governed and construed by Mississippi law. (Resp. App. 11a). An identical provision is found in the other releases, which state that Mississippi law governs. (Resp. App. 6a, 16a).

At the hearing before the ALJ, Mrs. Yates testified without contradiction that all settlements since Mr. Yates' death in 1986 had been split equally between her and the six children. (Tr. 26-28; Resp. App. 25a). Hence, as the ALJ found, Mrs. Yates recovered one-seventh (1/7) of each of the three post-death settlements. (R. 261-63; Pet. App. 83). The ALJ also found that under Mississippi's wrongful death statute, Miss. Code Ann. § 11-7-13 (1995 Supp.), damages for the wrongful death of a married man were required to be distributed equally to his wife and children. (R. 261; Pet. App. 83).

The ALJ found that Mrs. Yates' death claim was not barred by § 33(g) because she was not a "person entitled to compensation" at the time of the pre-death settlements. The ALJ also found that the employer was not entitled to offset its liability to Mrs. Yates for death benefits by the amounts recovered by the non-dependent adult children in the post-death settlements, as a matter of law. Instead, the ALJ held that the employer was contractually entitled to an offset and credit for the full third-party recovery, including that of the six adult, non-dependent children. (R. 244-64; Pet. App. 86).



Appeals were prosecuted to the BRB by Ingalls and Mrs. Yates. The BRB affirmed the ALJ's ruling on § 33(g), since Mrs. Yates was not a "person entitled to compensation" at the time of the pre-death settlements. The Board also affirmed the ALJ's decision that the Employer was not entitled, as a matter of law, to a credit against its liability for death benefits for amounts received by the non-dependent adult Yates children in the post-death settlements. A majority of the Board held that there was no contractual basis for allowing the offset of the full third party recoveries, and reversed the ALJ on this point. A majority of the Board also held that such a contract would be tantamount to a waiver of compensation which is barred by § 15(b) of the Act, 33 U.S.C. § 915. (Pet. App. 43-44).

Ingalls appealed the BRB's decision to the Fifth Circuit Court of Appeals. On October 3, 1995, the Fifth Circuit affirmed the BRB on all issues. (Pet. App. 1-17); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460 (5th Cir. 1995). Ingalls' suggestion for rehearing *en banc* was denied on November 22, 1995. (Pet. App. 18-19).

## REASONS FOR DENYING THE WRIT

### I.

**IS THE WIFE (A "POTENTIAL" WIDOW) OF AN INJURED WORKER A "PERSON ENTITLED TO COMPENSATION" UNDER § 33(g) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT ("LHWCA") WHEN SHE ENTERS INTO THIRD PARTY SETTLEMENTS DURING THE LIFETIME OF HER HUSBAND?**

On the issue of forfeiture under § 33(g) of the LHWCA, there are two separate reasons which justify denying the Petition

for a Writ of Certiorari. First, the Fifth Circuit's decision was clearly correct. Second, the Petitioners' argument in support of the writ — a split of authority between two circuits — does not automatically provide the "compelling reasons" to justify issuance of the writ. Sup. Ct. R. 10. ("A Petition for a Writ of Certiorari will be granted only for compelling reasons".).

The § 33(g) issue should not be accepted for review by the Court because the BRB and the Fifth Circuit fully considered and correctly decided the issue, based on this Court's interpretation of the phrase "person entitled to compensation" in *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992). The Petitioners make several misstatements or omissions of fact or law in their argument which the Respondent has a duty to address. Sup. Ct. R. 15.2. First, the Petitioners argue that by settling her future claims for the wrongful death of her husband during her husband's lifetime, Mrs. Yates extinguished the potential subrogation claims of Ingalls against the third party asbestos manufacturers. (Pet. Cert. 9). None of the pre-death settlements foreclosed Ingalls from bringing its own claim for reimbursement under *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S. Ct. 1144, 22 L. Ed. 2d 371 (1969). (Pet. App. 63). As Ingalls has asserted in other litigation, it has "an independent *Burnside* action against any settling third party defendant who has not obtained Litton's consent to (such) settlement". *Lowe v. Ingalls Shipbuilding, A Div. Of Litton Systems, Inc.*, 723 F.2d 1173, 1181 (5th Cir. 1984).

Second, the Petitioners' argument that "a potential widow's claim vests at the time of her husband's injury, as opposed to the time of his death" is contrary to logic and the overwhelming weight of authority. (Pet. Cert. 14). The argument is advanced to persuade the Court that Mrs. Yates was a "person entitled to compensation" at the time of the pre-death settlements under § 33(g), and of course, to grant the writ. This argument did not

persuade the ALJ, the BRB, or the Fifth Circuit, and it should not persuade this Court that it is a solid legal foundation on which to grant a discretionary writ of certiorari.

As observed by the Board and the Fifth Circuit, a claim for death benefits arises only upon the death of an injured worker covered by the LHWCA to whom the claimant was married or on whom the claimant was dependent. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, *supra*, at 464; (Pet. App. 10, 32-35, 68-69). This principle is also found in *Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 846 (5th Cir. 1981),<sup>4</sup> a case cited by the Petitioners in their brief. (Pet. Cert. 13). This well-settled principle is followed by an impressive line of cases from various circuits. *I.N.A. v. Dept. of Labor*, 969 F.2d 1400, 1405-06 (2nd Cir. 1992) (right to death benefits a separate claim which did not accrue until death); *Shea v. Director, OWCP*, 929 F.2d 736, 739 (D.C. Cir. 1991); *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 779, 784-86 (5th Cir. 1988) (n. 3) (right to death benefits may not be settled before it arises, i.e., before the death of the injured worker); *Henry v. George Hyman Const. Co.*, 9 F.2d 65, 73-74 (D.C. Cir. 1984) (n. 31) ("when death occurs, a new cause of action arises"); *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); *St. Louis Ship Building and Steel Co. v. Casteel*, 583 F.2d 876, 877 (8th Cir. 1978) ("liability for death benefits comes into existence only upon the event of death and is therefore independent of the liability for disability benefits occasioned by the earlier injury"); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, 853 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("right to death benefits does not vest until the time of death"); *State Insurance Fund v. Pesce*, 548 F.2d 1112, 1114 (2nd Cir. 1977) ("right to death benefits separate and distinct from right to disability benefits, and does not come into being

4. "A cause of action for death benefits certainly does not arise until death".

until death"); *Norfolk, Baltimore and Carolina Lines, Inc. v. Director, OWCP*, 539 F.2d 378, 380 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977) (death claim does not exist during decedent's lifetime, and does not become vested until death); *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76, 79 (4th Cir. 1950); *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 664 (2nd Cir. 1938), *cert. denied*, 304 U.S. 565 (1938).

In other words, a claim for disability benefits under § 8 of the LHWCA, such as the one advanced by Mr. Yates during his lifetime, and a claim for death benefits under § 9 of the Act, advanced by Mrs. Yates after her husband's death, are separate and distinct. The claims have different claimants, and they accrue on different bases. *Id.*; *Alabama Dry Dock and Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 1560-61 (11th Cir. 1986). The Petitioners argue that the Fifth Circuit overlooked "the fact that many aspects of a death claim vest at the time of the worker's injury", for example, determination of the responsible employer and questions of dependency. (Pet. Brief 13). Obviously, there is a connection between a deceased worker's original injury and a subsequent death claim by the worker's widow, because the 1984 Amendment to § 9 of the LHWCA provides a death benefit only if the employment injury causes the employee's death. *Shea v. Director, OWCP*, *supra*, at 737 (n. 1).

However, the issue is whether Mrs. Yates was a "person entitled to compensation" at the time of the pre-death settlements. In other words, did Maggie Yates qualify for a death benefit under the LHWCA at the time of the pre-death settlements? The ALJ, the Board, and the Fifth Circuit correctly answered, no, because Mrs. Yates's "right to death benefits under the Act could not have vested *before* she became a widow". (Pet. App. 35) (BRB's emphasis). As observed by the Fifth Circuit, there were three contingencies under which Mrs. Yates's right to



death benefits under the LHWCA would have never accrued. "She could have predeceased or divorced her husband, or Jefferson Yates could have died from causes unrelated to his employment". *Ingalls Shipbuilding, Inc. v. Director, OWCP*, *supra*, at 464; (Pet. App. 10-11, 35). Upon the happening of any of the three contingencies, Mrs. Yates' right to death benefits never would have accrued.

*Cowart's* discussion and interpretation of the statutory phrase "person entitled to compensation" at the time of a third-party settlement, is outcome-determinative, rather than factually distinguishable. This Court observed that "both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies", and it means only that "the person satisfies the prerequisites attached to the right". *Cowart v. Nicklos Drilling Co.*, *supra*, at 2595. *Cowart's* LHWCA disability claim vested at the time of his traumatic work-related injury, and he became a "person entitled to compensation" at the time of his injury. At the time of the pre-death settlements, it was Mr. Yates with his disability claim, and not Mrs. Yates, who was the "person entitled to compensation" within the meaning of § 33(g)(1). Simply put, the Fifth Circuit correctly decided that Maggie Yates did not meet the prerequisites for entitlement to death benefits at the time of the pre-death settlements, and she was not a "person entitled to compensation" at that time.

The Petitioners argue that the Fifth Circuit's *Yates* decision is in direct conflict with the Ninth Circuit's *Cretan* decision, and "consequently, because of this split among the circuits, there are special and important reasons" to grant the writ. (Pet. Cert. 10). *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 2705 (1994). The Respondent agrees that *Yates* conflicts with *Cretan*. *Cretan* dismisses this Court's interpretation in *Cowart* of the phrase "person entitled to

compensation", but *Cretan* does concede that *Cowart's* language "appears to support" the argument that a "potential" widow who enters into pre-death settlements has no vested claim and is not a "person entitled to compensation." (Pet. App. 97). Instead, *Cretan* dismisses *Cowart* and the plain language of § 33(g) on grounds of a "policy of employer protection that is evident on the face of Sections 33(f) and (g)" and a policy against "double recovery." *Cretan*, *supra*, at 847; (Pet. App. 98-99). No "policy considerations" can override the plain language of *Cowart* or the statute.

Moreover, a writ of certiorari will be granted "only for compelling reasons". Sup. Ct. R. 10. And, a split in two circuits does not control or fully measure the Court's discretion in considering the petition. *Id.* The Fifth Circuit's decision does not conflict with *Cowart*, but merely adheres to it as binding precedent. No important constitutional issue is involved, although the Respondent does not consider the issue of forfeiture under § 33(g) "unimportant". The nature of discretionary review by certiorari is underscored by the number of cases in which certiorari has been denied despite the presence of conflicts between the circuits. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* § 4.4, p. 169 (7th Ed. 1993).

The Petitioners identify a conflict between only two circuits, the Fifth and the Ninth Circuits. The commentators note a perceived policy of the Court not to address conflicts until more than two courts of appeals have considered an issue. *Id.*, at 171; *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) (n. 8) (certiorari granted; split of authority between four circuits). The purpose, it is said, is to allow an issue to percolate in the lower courts until a majority rule emerges. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* § 4.4, p. 171 (7th Ed. 1993); Justice Stevens, *Some Thoughts On Judicial Restraint*, 66 *Judicature* 177, 183 (1982).

Because the Fifth Circuit's *Yates* decision was correctly decided in accordance with *Cowart*, and because the petitioner identifies a conflict with only two circuits, the Court's discretion should be exercised to deny the Petition.

## II.

**DOES THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS HAVE STANDING TO RESPOND TO A PETITION FOR REVIEW OF A BENEFITS REVIEW BOARD DECISION PURSUANT TO FED. R. APP. P. 15(a)?**

In the context of this case, the issue of whether the Director has standing to respond to a Petition for Review does not have sufficient importance to justify granting the writ. The Fifth Circuit's discussion of the issue merited only a footnote in the lower court's opinion. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 463 (n. 2); (Pet. App. 6). The Fifth Circuit correctly decided the issue. The Director did not petition the BRB for review. In accordance with Fed. R. App. P. 15(a), the Fifth Circuit found that the plain dictate of the rule applies to a proceeding under 33 U.S.C. § 921(c). *Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 281-84 (5th Cir. 1982), *overruled on other grounds, Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406-07 (5th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 818 (1984).

## III.

**DOES § 33(f) OF THE LHWCA PERMIT THE EMPLOYER AND CARRIER TO OFFSET THEIR LIABILITY FOR DEATH BENEFITS TO A WIDOW WITH THIRD PARTY TORT RECOVERIES OF HER ADULT NON-DEPENDENT CHILDREN WHO DID NOT FILE LHWCA DEATH CLAIMS, HAD NO LEGAL STANDING TO INVOKE THE LHWCA, AND ARE NOT "PERSONS ENTITLED TO COMPENSATION"?**

The Petition should be denied on the § 33(f) offset issue because the Fifth Circuit correctly decided the issue on principled grounds found in the statute itself, and because the Petitioner has not identified any conflicts on this issue in the courts of appeals.

The Petitioners stipulated that none of the six (6) Yates' children were dependent on Mr. Yates at the time of his injury and death. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 462; (Pet. App. 3, 60; Tr. 37). None of the six (6) adult children of Mr. and Mrs. Yates were joined in Mrs. Yates's claim for death benefits under the LHWCA. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 462 (n. 1); (Pet. App. 3, 63). And, because § 9 of the LHWCA requires dependency, none of the adult children could have invoked the machinery of the Act to assert a claim for death benefits.

The ALJ found that wrongful death damages under Mississippi law were required to be equally distributed to the wife and children. (R. 261; Pet. App. 37-38, 83). This legal principle is in accord with Mississippi law. Miss. Code Ann. § 11-7-13 (1995 Supp.). Mrs. Yates testified that all post-death settlements had been split equally between her and the adult six



(6) children. (Tr. 26-28; Resp. App. 25a). The Fifth Circuit held that an "employer's offset rights are limited to the portion of the recovery intended for the employee" under § 33(f), quoting, *Brown v. Forest Oil Corp.*, 29 F.3d 966, 972 (5th Cir. 1994). *Ingalls Shipbuilding, Inc. v. Director, OWCP*, *supra*, at 465; (Pet. App. 13, 82-83). Although the Petitioners complain of "double recovery" by Mrs. Yates, there was clearly no double recovery since by operation of Mississippi law, the Claimant was entitled to only one-seventh (1/7) of the post-death settlements, and in fact received only that portion. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, *supra*, at 462; (Pet. App. 4, 37-38, 82-83).

The Petitioners' strained interpretation of § 33(f) was rejected by the Fifth Circuit, by focusing on the plain language of the statute, which refers to the "net amount recovered against such third party" . . . "by such person." (emphasis added). Clearly, the words, "by such person", refer to the "person entitled to compensation", words used in the first line of the statute. 33 U.S.C. § 933(f). In short, an employer is entitled to credit only for the net recovery from the third party made by the "person entitled to compensation." *Cowart* says precisely that. *Cowart v. Nickols Drillings, Co.*, *supra*, at 2596 ("§ 33(f) . . . mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from the third party").

The Petitioners do not identify any conflicts between the circuits. In fact, *Force v. Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991), a case cited by the Petitioners, agrees with the Fifth Circuit's treatment of the issue. (Pet. App. 12). Apportionment of the post-death settlements is also supported by *I.T.O. Corp. v. Sellman*, 967 F.2d 971, 972-73 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). (offset rights are limited to portion intended for claimant, the "person entitled to compensation").

This issue clearly was decided correctly. Coupled with the

lack of any clear conflict in the circuits, there is no firm basis for granting the discretionary writ of certiorari.

#### IV.

#### **DO THE RELEASE DOCUMENTS EXECUTED BY THE CLAIMANT-WIDOW AND HER ADULT, NON-DEPENDENT SIX CHILDREN IN CONNECTION WITH POST-DEATH SETTLEMENTS CLEARLY AND UNAMBIGUOUSLY REQUIRE THE WIDOW, MRS. YATES, TO GIVE THE EMPLOYER AND CARRIER A CREDIT FOR SUMS RECEIVED BY HER ADULT, NON-DEPENDENT SIX CHILDREN?**

The Petitioners assert that the writ should be granted to review the issue of whether the Petitioners are contractually entitled to an offset in connection with the post-death settlements. The ALJ ruled that Mrs. Yates was contractually obligated to give the Employer credit for the entire amount of the post-death settlements, not only the one-seventh (1/7) she received, based on *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987). (Pet. App. 41, 86). The Board reversed, finding the ALJ's decision contrary to law, distinguishing the *St. John* case, and finding that the Petitioners were not parties to the settlements and were not third party beneficiaries of the releases. In *Wilfred*, the employer was a party to the third-party settlements. Alternatively, assuming the ALJ correctly interpreted the post-death settlement documents as entitling the employer to a credit for the entire net proceeds of the settlements, the Board found this interpretation of the settlement documents was precluded by § 15(b) of the Act. (Pet. App. 43-44, 51-52).

The Board did more than suggested by the Petitioners. The Petitioners assert only that the Board "found that Ingalls was not

a party to the releases". (Pet. Cert. 23). However, the majority of the Board also found that the language of the settlement documents, including the Raymark documents offered in evidence by the Petitioners, revealed that the intent of the releases was that the employer would receive credit only for the net amount received by Mrs. Yates, the "person entitled in compensation" and the only death claimant under the LHWCA. (Pet. App. 43, 52). The Fifth Circuit did not address the BRB ruling that Ingalls was not a party to the settlement documents, and was not a third party beneficiary. Instead, the Fifth Circuit held that the language of the settlement documents did not clearly and unambiguously require Mrs. Yates to give Ingalls a credit for any sums that exceeded the net amount she received from the post-death settlements. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 466; (Pet. App. 14).

The Petition should be denied for several reasons. First, the Fifth Circuit correctly decided the legal issue. The Petitioners assert that the Fifth Circuit "erroneously substituted its interpretation of the language of the releases for that of the Administrative Law Judge", and "re-weighed the evidence." (Pet. Cert. 23-24). The Raymark settlement provides in part that:

*... If any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier . . . ordered to pay such compensation benefits shall first be given credit for the consideration paid to the undersigned under this agreement, less reasonable costs of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.*

(Resp. App. 3a-4a) (emphasis added). The Fifth Circuit found that language almost identical to that quoted in the Raymark release was "included in the other two instruments." (Pet. App. 16).

In short, notwithstanding that the Petitioners and Mrs. Yates have different views of the settlement documents, the critical operative paragraph reflected an intent to give the Employer a credit to the extent that any compensation payments constituted "a lien against the consideration paid herein." (Pet. App. 14, 15). "Obviously, the only portion of the third party settlement which could be subject to a lien are for sums paid to a person 'entitled to compensation'." *Id.* In other words, reasonably interpreted, if "any such claim" (a workers' compensation claim) was filed and was successful, and if the compensation ordered to be paid *found* to be a lien, then the employer was to be given credit for the compensation benefits to any releasor. (Pet. App. 15) (emphasis added).

There had to be a further finding that the compensation ordered to be paid was a lien against the net proceeds paid to Mrs. Yates and her adult children, a contingency precluded by § 33(f) and, in any event, to be determined by a final adjudication under the LHWCA. If, as the Petitioners assert, this issue is characterized as a fact-finder's interpretation, a petition for a writ of certiorari is rarely granted when the asserted error involves factual findings. Sup. Ct. R. 10. The primary responsibility in the federal system of assessing the record to determine whether agency findings are supported by substantial evidence lies with the court of appeals, not the Supreme Court. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974) (Supreme Court will intervene only in "rare instances where the standard appears to have been misapprehended or grossly misapplied"). To grant the writ on this issue would convert the Court into a tribunal of errors and appeals, beyond its proper function in the federal system.



Second, the post-death settlements were consummated in connection with a Mississippi diversity action, and the three releases provided that they were governed by Mississippi law. (Pet. App. 38, n. 13; Resp. App. 6a, 11a, 16a). The legal interpretation of the contractual language necessarily was based on Mississippi law, as was the apportionment of the post-death settlements under the Mississippi wrongful death statute. (Pet. App. 43, 51-52, 83). The concurring judge of the Board noted that the Employer was not a party to the releases, and the intent of the parties to the releases had to be determined by the terms of the contract as a whole in light of the circumstances under which the contracts were made, citing a legal encyclopedia, 17A Am. Jur. 2d *Contracts* § 440-41. (Pet. App. 51-52).

There is no compelling reason to issue the writ on a matter of contract interpretation, especially when state law applies by the terms of the settlement documents themselves and the Employer was not a party to the contracts. The Petitioners assert that the Fifth Circuit overlooked the district court's order in connection with the Wellington settlement, which purports to address credits. However, the district court could not alter the terms of the release. And, jurisdiction to adjudicate LHWCA credits under § 33(f) lies elsewhere, under the adjudicatory process of the LHWCA.

The Petitioners assert that Ingalls approved the post-death settlements based on Mrs. Yates' representations in the LS-33 forms. (Pet. Cert. 5). However there is nothing in the record which reflects that estoppel was raised at the formal hearing before the ALJ. (R. 260-63). This issue cannot be raised for the first time on appeal. *Moore v. Paycor, Inc.*, 11 B.R.B.S. 483 (1979); *Dueringer v. Gen. Amer. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988) (ERISA preemption defense waived if not timely raised). The application of estoppel depends on factual findings, which are not found in this record. Accordingly, it cannot be

raised in this appeal. *Nat. Companies Health P. v. St. Joseph's Hosp.*, 929 F.2d 1558, 1572-74 (11th Cir. 1991).

Third, the writ should not be granted because the decision below is correct on other independent grounds, not reached by the Fifth Circuit. The Employer was not a signatory to the releases, and could not be considered a third party beneficiary of the settlement documents under state law. The intent of the releases was to protect the third party tort defendants. The releases were not for the benefit of the Employer, other than incidentally. (Pet. App. 43, 51). A mere incidental beneficiary acquires no right against the promisor or promisee. The provision of the contract in issue must have been placed in the contract for the direct benefit of the third party beneficiary. *Miss. High School Activities Assoc., Inc. v. Farris*, 501 So. 2d 393, 396 (Miss. 1987). As a mere incidental beneficiary, the employer acquired no rights against the parties to the contract. *Gerard J. W. Bros. & Co., Inc. v. Harkins & Co.*, 883 F.2d 379, 382 (5th Cir. 1989).

Moreover, the Board found that acceptance of the Employer's version of the releases would work a waiver of Mrs. Yates's compensation in violation of § 15(b) of the Act, 33 U.S.C. § 915(b). (Pet. App. 44, 52). Sections 15(b) and 16 of the LHWCA invalidate a release of compensation by a claimant without approval under § 8(i) of the Act. *Oceanic Butler, Inc. v. Nordahl, supra*, at 777 (n. 3). A decision on the issue is unnecessary, since the decision below is correct on other grounds. *Belcher v. Stengel*, 429 U.S. 118, 119, 97 S. Ct. 514, 50 L. Ed. 2d 269 (1976).

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX A — ABSOLUTE RELEASE - RAYMARK RELEASE

### ABSOLUTE RELEASE

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, *Maggie J. Yates, Darlene Y. Foster, Peggy W. Moore, Maudean Y. Peacock, Phillip G. Yates, Roger L. Yates & Robert W. Yates*, Spouse and heirs of *Jefferson T. Yates*, deceased, Social Security Number 416-16-5370 (hereinafter collectively referred to as "Releasors"), for and in consideration of the total sum of \$2,821.00, cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, do hereby fully, completely and finally remise, release, acquit, discharge, indemnify and hold harmless Raymark Industries, Inc., its insurers, owners, predecessors, successors, designees, representatives, assigns, principals, agents, servants, employees, employers, divisions, stockholders, directors, officers, parent corporation, subsidiary corporations (hereinafter collectively referred to as "Releasees"), of and from any and all claims, demands, actions, causes of action, suits and damages of every kind and nature whatsoever, including, but not limited to, any and all rights of recovery under Miss. Code Ann. § 11-7-13 (Supp. 1982) and any and all claims for strict liability, negligence, conspiracy and/or breach of warranty, which Releasors may have or claim to have, for actual or punitive damages, costs, loss and expense of every kind or nature whatsoever, whether known or unknown, anticipated or unanticipated, and whether accrued or hereafter to accrue, including, without limitation, any claim for cancer, mesothelioma or any other condition or disease and the risk thereof, caused by, resulting from, growing out of or in any manner connected with the alleged exposure of *Jefferson T. Yates*, deceased, to asbestos or asbestos-containing products mined, manufactured, sold, supplied, distributed or rebranded



## Appendix A

by Releasees and said consideration is hereby acknowledged to be paid, received and performed in full and complete compromise, settlement, accord and satisfaction therefor, all as is hereinafter described with particularity. It is expressly understood and agreed that this Release shall not affect any claim, cause of action or right that Releasors may have against Releasees based upon their individual exposure to asbestos and resulting asbestos-related disease. Such claim, cause of action or right is expressly reserved.

Releasors also agree and stipulate that they will dismiss with prejudice Raymark Industries, Inc. from the civil action now pending in the U.S. District Court Southern District of Miss., styled, *Jefferson T. Yates vs Raymark Industries, Inc.*, Civil Action No. 581-0243(G) but with the understanding that Releasors reserve their right to proceed against all other Defendants named therein, and Releasors covenant and agree to forever refrain and desist from instituting, prosecuting or asserting against Releasees any claim, demand, action or suit hereby released.

Releasors further agree, covenant and warrant that there have been no assignments of any rights or claims hereby released to any person or persons not joining in this Release; and Releasors will defend, hold harmless and indemnify Releasees to the extent of the consideration paid hereby as to any and all such claims of assignment, and agree, stipulate and warrant that, hereafter, Releasees are and shall be forever free of liability and will be as free of liability in the premises as if the aforesaid rights or claims had never existed.

Releasors understand that Releasees deny any and all liability in the premises, and Releasors represent and warrant

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that they have no other presently existing claims as against Releasees which were not included in the aforesaid civil action, and that this Release and the dismissal of the aforesaid civil action with prejudice extinguishes each and every right and claim which Releasors have, have ever had or may ever have in the premises, as against Releasees which may have arisen from the alleged exposure of *Jefferson T. Yates*, deceased, to asbestos or asbestos-containing products mined, manufactured, sold, supplied or rebranded by Releasees.

Releasors represent, covenant and warrant that they are the sole and only natural and legal heirs at law of *Jefferson T. Yates*, deceased, and are the only persons entitled to bring an action pursuant to Miss. Code Ann. § 11-7-13 (Supp. 1982) for the death of *Jefferson T. Yates*, deceased.

It is understood and agreed by Releasors that the payment and receipt of the aforesaid consideration is not to be construed as an admission of any liability whatsoever by Releasees and that Releasees specifically deny any such liability to Releasors, and that if *Jefferson T. Yates*, deceased, was exposed to any asbestos-containing products mined, manufactured, sold, supplied or distributed by Releasees, such exposure was minimal and that it is extremely doubtful that there was any such exposure or that any such exposure caused or contributed to any injuries to *Jefferson T. Yates*, deceased.

Releasors do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including but not being limited to the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be

## Appendix A

successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to any Releasor shall first be given credit for the consideration paid to Releasors under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to any Releasor until the consideration paid to Releasors under this agreement is exhausted. It is further agreed, in the alternative, that should this agreement be found invalid or should any such employer or compensation carrier making such compensation benefits payments refuse to abide by this agreement, and file or demand payment by Releasees, then and in that event, and as an alternative to the above agreement, Releasors agree to indemnify and hold harmless Releasees to the full amount of the consideration paid to Releasors under this agreement arising out of such claim for subrogation or indemnity by such employer and/or such employer's insurance carrier.

It is the specific intent and purpose of Releasors to execute this Release only as to Releasees, and it is understood and agreed by the parties hereto that this Release is not intended to nor does it release any other person, firm, corporation, or any other entity or party who or which may be responsible in whole or in part for any injuries, diseases, and illnesses, or other damages sustained by the deceased, and/or Releasors as a result of the alleged exposure of *Jefferson T. Yates*, deceased, to asbestos or any asbestos-containing product. It is the specific intent of the parties to this agreement and they do hereby reserve unto Releasors, all claims and causes of action, whether past, present or future, against all other persons, firms, corporations, parties or other entities, including, but not limited to, those claims included in the aforesaid civil action.

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In executing and delivering this release, Releasors rely wholly upon their own judgment, knowledge and belief as to the nature, extent and duration of the injuries and damage which they may have suffered or sustained, or may sustain in the future, as the result of the events, incidents or occurrences hereinabove specified, and, as to the questions of liability involved, Releasors have had the benefit of legal counsel of their own choosing, said counsel having indicated his approval of this settlement and the execution and delivery of this Release by the affixing of his signature hereto, and Releasors further represent and warrant that they have not been influenced by any representations, statements, or warranties made by any person, firm, partnership, association, organization or corporation hereby released, or by any agent, or other person representing Releasees, concerning the nature or extent of their injuries or damages, or losses, or the legal liability therefor.

Releasors, individually and jointly, certify that they are of legal age, under no disability of any kind, and fully and completely competent to execute this Release in their own behalf. Releasors agree and covenant that any defect in this Release which may exist as a result of the incompetency of Releasors or any statutory beneficiary of *Jefferson T. Yates*, deceased, is waived.

In the event that the estate of *Jefferson T. Yates* deceased, remains open at the time of the execution of this Release, then Releasors covenant and agree that they have been duly and properly authorized by a court of competent jurisdiction to execute this Release and to accept the aforesaid consideration in full and complete satisfaction for all claims they have or may ever have or which the estate of the deceased has or may ever have as against Releasees. In the alternative, Releasors certify



## Appendix A

and warrant that *Jefferson T. Yates*, deceased, died intestate, and no estate has been opened and no administrator of an estate has been appointed.

Should it develop that there are any mistakes in this instrument, whether mutual or unilateral, which cause the release of Releasees to be defective or less than complete, Releasors will execute any and all instruments and do any and all things necessary to effectuate a full, final and complete release.

It is understood and agreed that the terms and conditions of this Release shall remain confidential, and shall not be disclosed to any person who is not a party to this Release.

It is further understood and agreed that the terms of this Release shall be construed and governed by Mississippi law.

WITNESS our signatures, this the \_\_\_\_ day of \_\_\_\_, 1987.

s/ Maggie J. Yates

s/ Darlene Y. Foster

s/ Peggy W. Moore

s/ Maudean Y. Peacock  
POA Maggie Yates

s/ Phillip G. Yates

s/ Roger L. Yates

s/ Robert W. Yates

## APPENDIX B — ACKNOWLEDGEMENT

I, *Maggie J. Yates, Widow of Jefferson T. Yates, Dec.* do hereby acknowledge and accept this settlement my attorney has negotiated with the Defendant, *Raymark Industries, Inc.* I fully understand that in the event I am successful in my Workmen's Compensation Claim now pending against Litton Systems, Inc. That Litton Systems, Inc. will be given credit for the amount of money paid to me by the above named Defendant, and that Litton Systems, Inc. will owe me no Workmen's Compensation benefits or medical benefits under the Longshoremen and Harborworker's Compensation Act until the amount received by me from the above mentioned Defendant has been exhausted based on the weekly benefits due me from Litton Systems, Inc. under the aforementioned act or based on medical expenses I incur as a result of my industrial injury associated with my exposure to asbestos. I fully understand that I can only be compensated for my injury one time and that my employer or former employer, Litton Systems, Inc. is either entitled to a credit for the amount of any settlements I enter into with Third Party Defendants; or Litton Systems, Inc. is entitled to be subrogated\* against any settlement I might make for benefits which have been paid to me under the above mentioned act, and I accept this settlement with full knowledge of these facts and after having been fully advised by my attorney of the foregoing circumstances and situation.

WITNESS my signature this the 27th day of April, 1988.

s/ Maggie J. Yates  
Maggie J. Yates, Widow of  
Jefferson T. Yates, Dec.

\* In this situation the word "subrogated" means that Litton Systems, Inc. will have to be paid back any money it has paid under LHWCA.

**APPENDIX C — PARTIAL RELEASE -  
WELLINGTON RELEASE**

**PARTIAL RELEASE**

FOR AND IN CONSIDERATION of the sum of Sixty Thousand and No/100 Dollars (\$60,000.00), cash in hand this day paid, the undersigned, Maggie J. Yates, Social Security No. 416-30-5633, individually, and as Personal Representative of the Estate of Jefferson T. Yates, deceased, and Darlene Foster, Peggy Moore, Maudean Peacock, Phillip Yates, Roger Yates and Robert Yates, adult children of Jefferson T. Yates, deceased, for themselves, their heirs, administrators, executors, personal representatives, and assigns (said parties hereinafter collectively referred to as "the undersigned" or "Releasors"), do hereby release and forever discharge ACandS, Inc.; Zurich American Insurance Companies; Aetna Life & Casualty Co; U.S. Gypsum; Amchem Products, Inc. (succeeded in interest by Union Carbide Agricultural Products, Inc.); Union Carbide; American Universal Insurance Group; Unijax; A. P. Green Refractories Company; Armstrong World Industries, Inc; T & N plc formerly known as Turner & Newall PLC; Bituminous Casualty Corp.; Thorpe Insulations; Carey Canada, Inc.; Shook & Fletcher; Royal Insurance Co.; CertainTeed Corp.; Rock Wool Manufacturing Co.; C. E. Thurston & Sons, Inc.; Reliance Insurance Co.; CIGNA Property and Casualty Insurance Cos.; Quigley; Continental Corp.; Pittsburgh Corning Corp.; Crum & Forster; Pfizer; Dana Corp.; Owens-Illinois, Inc.; Eagle-Pitcher Industries, Inc.; Owens-Corning Fiberglas Corporation; Employers Insurance of Wasau; Nuturn Corp.; Fiberboard Corp.; Nuclear & Environmental Protection, Inc.; Fireman's Fund, Inc.; North Brothers; First State Insurance Company; Nosroc Corp.; I.U. North America, Inc.; National Service Industries, Inc.; Flexitallic Gasket Company, Inc.; National Gypsum Co.; The Flintkote Co.; Maremont Corp.; Genstar

*Appendix C*

Corp.; Lloyd's of London; Harbor Insurance Co.; Hartford Insurance Group; Liberty Mutual Insurance Co.; H. K. Porter Company, Inc.; The Keene Corp.; GAF Corporation; Hopeman Brothers, Inc.; Porter Hayden Company; and The Celotex Corporation, including, but not limited to, The Philip Carey Manufacturing Company (incorporated in 1888), The Philip Carey Manufacturing Company (incorporated in 1966), Philip Carey Corporation, Briggs Manufacturing Company, Panacon Corporation; their present and former parent corporations, subsidiary corporations, successor corporations, predecessor corporations, affiliated corporations, and each of the aforesaid or above-described corporation's or company's present and former successors, predecessors, and assigns, insurers, reinsurers, and their present and former directors, officers, agents, servants, employees, and stockholders of all such corporations or companies, and any and all other persons, firms, partnerships, associations or corporations who are or may be in any manner whatsoever liable for their acts, or for the acts of any of them (said parties hereinafter collectively referred to as "Releasees"), jointly

\* \* \*

Mississippi against all other persons, firms corporations, parties, or other entities, other than the Releasees herein.

The undersigned do further agree that for the aforesaid consideration, Releasees will be dismissed with prejudice from Civil Action No. S81-0243(G) now pending in the United States District Court for the Southern District of Mississippi, but with the understanding also that the undersigned reserve their right to proceed against all other defendants named therein.



*Appendix C*

The undersigned do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including, but not being limited to, the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to either of the undersigned shall first be given credit for the consideration paid to the undersigned under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted. It is further agreed in the alternative, that should this agreement to be found invalid or should any such employer or compensation carrier making such compensation benefits payments refuse to abide by this agreement, and file or demand payment by Releasees, then and in that event, and as an alternative to the above agreement, the undersigned agree to indemnify and hold harmless Releasees to the full amount of the consideration paid to the undersigned under this agreement arising out of such claim for subrogation or indemnity by such employer and/or such employer's insurance carrier.

The undersigned, Maggie J. Yates, Phillip Yates, Roger Yates, Robert Yates, Darlene Foster, Peggy Moore and Maudean Peacock, certify that they are of legal age, with no mental disability of any kind, and are fully and completely competent to execute this release each in his or her own behalf and in the capacities shown. It is understood and agreed that this instrument contains the entire agreement between the parties and the undersigned in executing the same agree that no promise,

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inducement, or agreement not expressed herein has been made to the undersigned, and that in executing the same they are relying upon their own judgement as to the full extent and nature and the duration of any injuries, illnesses, and damages of Jefferson T. Yates, and any damages sustained by the undersigned. The undersigned declare that the terms of this agreement have been read, voluntarily accepted and agreed to and approved by their attorney of record.

This release shall be governed and construed by the laws of the State of Mississippi.

WITNESS OUR SIGNATURES, this the 5th day of April, 1989.

s/ Maggie J. Yates  
MAGGIE J. YATES, Individually and as  
Personal Representative of the Estate of  
JEFFERSON T. YATES, Deceased

s/ Phillip Yates, P.O.A. Maggie J. Yates  
PHILLIP YATES, Adult Son of  
JEFFERSON T. YATES, Deceased

s/ Roger Yates  
ROGER YATES, Adult Son of  
JEFFERSON T. YATES, Deceased

s/ Robert Yates  
ROBERT YATES, Adult Son of  
JEFFERSON T. YATES, Deceased

*Appendix C*

s/ Darlene Foster  
 DARLENE FOSTER, Adult Daughter of  
 JEFFERSON T. YATES, Deceased

s/ Peggy J. Moore 3/10/89  
 PEGGY MOORE, Adult Daughter of  
 JEFFERSON T. YATES, Deceased

s/ Maudean Peacock 3/30/89  
 MAUDEAN PEACOCK, Adult  
 Daughter of JEFFERSON T. YATES,  
 Deceased

EXECUTED IN MY PRESENCE  
 AND APPROVED BY ME:

s/ Ransom P. Jones, III  
 RANSOM P. JONES, III  
 Attorney for Releasors

**APPENDIX D — PARTIAL RELEASE - PRO TANTO  
 RELEASE COVENANT NOT TO SUE -  
 MANVILLE RELEASE**

[PARTIAL RELEASE/PRO TANTO RELEASE/  
 COVENANT NOT TO SUE]

FOR AND IN CONSIDERATION of the sum of *Forty-three Thousand and No/100 Dollars (\$43,000.00)*, cash in hand this day paid, the undersigned, *Maggie J. Yates*, Social Security No. *416-30-5633*, individually, and as personal representative of the Estate of *Jefferson T. Yates* deceased, and *Maudean Y. Peacock*, *Phillip G. Yates*, *Roger L. Yates*, *Peggy Moore*, *Robert Wayne Yates*, *Darlene Y. Foster*, adult children of the deceased, for themselves, their heirs, administrators, executors, personal representatives, and assigns (said parties hereinafter collectively referred to as "the undersigned") do hereby [partially release/pro tanto release/covenant not to sue] and forever discharge the MANVILLE PERSONAL INJURY SETTLEMENT TRUST, THE MANVILLE CORPORATION (hereinafter "Manville"), their past, present, or future trustors, trustees, directors, officers, agents, servants, employees, attorneys, successors in interest, predecessors in interest, parents, subsidiaries, both insurers and all Settling Insurance Companies (as defined in the Second Amended Plan of Reorganization, p. M-155) (both only to the extent of their liability as insurers to Manville, but not in their individual capacities or otherwise) and assigns, and their agents, servants, employees, heirs, executors and administrators, their successors and assigns (hereinafter collectively referred to, and considered as "the TRUST") from any and all liability arising out of, attributed to, or connected with exposure of the deceased to asbestos, and/or products or things containing asbestos, made, milled, manufactured, mined, fabricated, distributed, sold or otherwise connected with the TRUST from any and all claims,



*Appendix D*

demands, damages, actions, causes of action, suits in equity, rights, costs, loss of services or consortium, expenses and compensation whatsoever, under any present and/or future theory of law, in contract tort or otherwise, from any and all damages and injuries known and unknown, anticipated and unanticipated, foreseen and unforeseen, past, present and future, including but not limited to claims that the undersigned may now or hereafter have as a result of the decedent's death for medical expenses, pain and suffering of decedent prior to his death, loss of consortium, companionship, services, and society, the value of life or decedent and any and all other claims for damages of whatsoever.

It is also expressly understood and agreed that this release shall not affect any claim, cause or action, or rights that the undersigned may have against the TRUST based upon their individual exposure to asbestos and resulting asbestos-related disease.

\* \* \*

agreement and they do hereby reserve unto the undersigned, their heirs, administrators, executors, dependents and assigns, all claims, actions, and causes of action, whether past, present, or in the future, including, but not limited to, those claims included in Civil Action No. S81-0243(G) now pending in the United States District Court for the Southern District of Mississippi against all other persons, firms, corporations, parties, or other entities, other than the TRUST herein.

The undersigned do further agree that for the aforesaid consideration, the TRUST will be dismissed with prejudice from Civil Action No. S81-0243(G), now pending in the United States

*Appendix D*

District Court for the Southern District of Mississippi, but with the understanding also that the undersigned reserve their right to proceed against all other defendants named therein.

The undersigned do hereby represent and warrant to the TRUST that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including, but not being limited to, the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to either of the undersigned shall first be given credit for the consideration paid to the undersigned under this agreement, less reasonable cost of collection and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.

It is understood that the TRUST is required to report to the Bankruptcy Court and may be required by law or the TRUST'S fiduciary duties to beneficiaries to report that it has settled with the undersigned and the amount of the settlement.

The undersigned certify that they are of legal age, with no mental disability of any kind, and are fully and completely competent to execute this release each in his or her own behalf. It is understood and agreed that this instrument contains the entire agreement between the parties and the undersigned in executing the same agree that no promise, inducement, or agreement not expressed herein has been made to the undersigned, and that in executing the same they are relying

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upon their own judgment as to the full extent and nature and the duration of any injuries, illnesses, and damages of the undersigned. The undersigned declare that the terms of this agreement have been read, voluntarily accepted and agreed to and approved by their attorney of record.

This release shall be governed and construed by the laws of the State of Mississippi.

WITNESS OUR SIGNATURES, this the 3 day of March 1989.

s/ Maggie J. Yates  
Maggie J. Yates

s/ Maudean Y. Peacock  
Maudean Y. Peacock

s/ Phillip G. Yates by Maggie J. Yates  
Phillip G. Yates

s/ Roger L. Yates  
Roger L. Yates

s/ Robert Wayne Yates  
Robert Wayne Yates

s/ Peggy Moore  
Peggy Moore

s/ Darlene Y. Foster  
Darlene Y. Foster

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APPROVED:

s/ Ranson P. Jones  
Ranson P. Jones  
Attorney for Plaintiffs



APPENDIX E — TRANSCRIPT OF PROCEEDINGS  
PAGES 22-28

[22] JUDGE McCOLGIN: Off the record.

(Discussion held off the record.)

JUDGE McCOLGIN: On the record.

Whereupon,

MAGGIE YATES

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE McCOLGIN: May I ask you your full name, please?

THE WITNESS: Maggie Yates.

JUDGE McCOLGIN: Thank you. Proceed, counsel.

DIRECT EXAMINATION

BY MR. WILSON:

Q Ms. Yates, where do you live?

A Lucedale on Route 8, Box 249.

Q That is Jackson County, Mississippi?

A No, sir, that is George County.

Appendix E

Q George County, Mississippi?

A Yes.

Q How long have you lived there?

A Well, 30 something years. I couldn't tell you exact.

Q I believe that you were married to Mr. Jefferson Yates, Is that correct?

A Yes, sir. 1931.

[23] Q August 29, 1931? Is that correct?

A No, sir, September 3, 1931.

Q Were you divorced from him?

A No, sir.

Q Mr. Yates I believe passed away January 28, 1986. Is that correct?

A that's right.

Q You were married to him at that time?

A Yes, sir.

Q Did you and Mr. Yates have any children/

A Yes, sir, we did.

*Appendix E*

Q How many children did you have?

A Six, three girls and three boys.

Q Ms. Yates, I think you have a birthday coming up in August, do you not?

A Yes, sir, the 29th.

Q You will be 83 years of age, I believe?

A That's right.

Q Ms. Yates, do you recall that your husband had filed a claim for asbestos disease against the various manufacturers of asbestos material?

A Yes, sir.

Q And that was filed in the Southern District of Mississippi, I believe, was it not?

A Yes, sir, as far as my knowledge it was.

[24] Q Do you recall when that lawsuit was filed?

A No, sir, I sure don't. I don't remember that.

Q If I told you 1981 would that ring a bell with you?

A That seems like that might be it. I wouldn't say for sure because I don't really know.

*Appendix E*

Q After your husband filed a claim do you recall coming to our office and receiving some settlements from different companies?

A Yes, sir.

Q Do you recall that in May of 1981 that you got a settlement from Combustion Engineering in the amount of \$11,500 gross amount with \$300 going to you and Mr. Yates?

A Yes, sir.

Q And in I believe May of 1982 you and Mr. Yates received two settlements, and those were one from Garlock in the gross amount of \$300 with \$180 to you and Mr. Yates and Rockwool which was a gross settlement of \$1,200 for a net to you and Mr. Yates of \$720. Does that ring a bell with you?

A Yes, sir, that seems right.

Q Then in March of 1982 with Armstrong Cork you had a settlement of \$500 with a net to you and Mr. Yates of \$300?

A Yes, sir.

Q And in March of 1983 with H.K. Porter, one of the [25] asbestos manufacturing companies? The amount of the settlement was \$7,250 with a net to you and Mr. Yates of \$4,350. Do you remember that?

A Yes, sir.

Q Then in 1984 you and Mr. Yates, and this was still at a time when he was alive, correct?



## Appendix E

A That's right.

Q In January of 1984 there was a settlement with G.A.F. Corporation in the gross amount of \$6,000 with a net to you and Mr. Yates of \$3,600. Is that correct? Do you recall that?

A As far as my knowledge it is.

Q Do you recall prior to that time that Mr. Yates would have settled his claim against Ingalls for a lump sum amount? Do you recall that?

A I don't remember.

Q Do you recall whether or not that settlement of \$3,600 from G.A.F. went to you and Mr. Yates, or did it go back to Ingalls?

A Well, look. I am going to tell you know just in my words like I did. They sent us a check of what they call compensation I guess. We turned it back. You know, we didn't pay it all back at one time, but we did pay it all back. Mr. Jones knows that, If that is what you are talking about.

[26] Q In January of that same year there was a settlement with Owens Corning Fiberglass in the amount of \$14,300, of which the clients' portion would have been \$8,580. Do you recall that?

A Yes, I guess so. As far as I know. I tell you, I have had to much up to now that I really don't remember every one of them.

Q And on January 31, 1984, \$3,000 gross amount from Owens Illinois. The client portion was \$1,775. Is that correct?

## Appendix E

A Yes.

Q Mr. Yates died in January of 1986. Is that correct?

A Yes, sir.

Q January 28 to be exact?

A That's right.

Q After Mr. Yates' death do you recall getting some settlements in from some of the asbestos companies?

A Well, as far as my knowledge we got one check. The first one was \_ was it \$70?

Q Let me ask you: In May of 1988 do you remember getting a check from a settlement with Raymark Corporation in the amount of \$1,880.67, of which your portion was \$79.07?

A That is what I am talking about. That's it.

[27] Q A portion of that, some \$1,327.21, was returned to Ingalls as a lien?

A Yes, it was. That's right.

Q And the balance of that was divided between you and your six children? Is that correct?

A Yes. Right.

Q In April of 1989, some three years after your husband's

*Appendix E*

death, there was a settlement with the Wellington Group in the gross amount of \$60,000, and out of that you received a check for \$5,142.86?

A That's right.

Q And each of your children got that amount also? Is that correct?

A The same. They got the same.

Q Out of the net \$36,000?

A That's right.

Q Then in June of 1989 there was a settlement with the Johns Manville Corporation in the gross amount of \$43,000 with a net of \$25,800, and you got a check out of that for \$3,685.72 as your portion. Is that correct? That would be on the last page of C-1. That would have been in June of 1989. Do you recall that?

A No. No, sir. We didn't get none in 1989. We sure didn't.

Q This would have been two years ago in May of 1989 [28] with Johns Manville. The gross amount was \$43,000. Regardless of when it was, do you recall settling with Johns Manville Corporation for \$43,000?

A Uh-uh.

Q You did not recall that?

A No.

*Appendix E*

Q Other than those I have just gone over with you do you know of any other settlements that you would have gotten that I have not gone over with you?

A No, sir, I sure don't.

Q Since your husband's death in 1986, the settlements that have come in since that time, have those always been split between you and your children?

A Yes, sir.

MR. WILSON; I have no other questions.

**CROSS-EXAMINATION**

BY MR. HOWELL;

Q Ms. Yates, you and your husband I believe you said married back in the 1930s. Is that correct?

A 1931.

Q And you never divorced or separated from then up until his death?

A No, we sure didn't.

Q And you said you had six children, three girls and three boys. Is that right?

\* \* \*



(3)  
No. 95-1081

Supreme Court, U.S.

FILED

APR 10 1996

**In the Supreme Court of the United States**

OCTOBER TERM, 1995

INGALLS SHIPBUILDING, INC., ET AL.,  
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

**BRIEF FOR THE FEDERAL RESPONDENT**

DREW S. DAYS, III  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

J. DAVITT MCATEER  
*Acting Solicitor of Labor*

ALLEN H. FELDMAN  
*Associate Solicitor*

EDWARD D. SIEGER  
*Attorney*  
*Department of Labor*  
*Washington, D.C. 20210*

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## QUESTIONS PRESENTED

1. Whether Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g)(1), which requires a "person entitled to compensation" to obtain an employer's prior written approval of certain settlements with a third party who may be liable for a work-related injury, applies to an injured employee's relative who settles a potential wrongful death action while the employee is alive.

2. Whether the Director of the Office of Workers' Compensation Programs has standing to participate in the court of appeals as a party respondent when an employer seeks review of a Benefits Review Board decision affirming an award of LHWCA benefits.

3. Whether Section 33(f) of the LHWCA, 33 U.S.C. 933(f), which allows an employer to offset against its liability to a person entitled to compensation under the LHWCA the net recovery received by that person in a suit against third parties, also allows an employer to offset recoveries by persons who are not entitled to compensation under the LHWCA.

4. Whether the language of three settlement agreements entered into by respondent Yates and third parties contractually obligates respondent Yates to allow petitioner to offset against its liability to her under the LHWCA the settlement amounts paid to other surviving relatives who are not entitled to compensation under the LHWCA.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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No. 95-1081

INGALLS SHIPBUILDING, INC., ET AL.,  
PETITIONERS

*v.*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENT**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-17) is reported at 65 F.3d 460. The decision and order of the Benefits Review Board (Pet. App. 20-55) are reported at 28 Ben. Rev. Bd. Serv. (MB) 137, and the decision and order of the administrative law judge (Pet. App. 56-88) are reported at 26 Ben. Rev. Bd. Serv. (MB) 174.

**JURISDICTION**

The judgment of the court of appeals was entered on October 3, 1995. A petition for rehearing was denied on November 22, 1995. Pet. App. 18-19. The petition

for a writ of certiorari was filed on January 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires employers to pay compensation to covered employees for work-related injuries that result in disability, and also to the survivors of covered employees if the injury causes death. 33 U.S.C. 908, 909; see also 33 U.S.C. 907 (employer must provide medical services for covered injuries). A "person entitled to \* \* \* compensation" under the LHWCA may also recover from a third person who is liable in damages. 33 U.S.C. 933(a). If a person entitled to compensation obtains a third-party recovery, the employer receives a credit against its LHWCA liability to that person for the net amount recovered by that person against the third party. See 33 U.S.C. 933(f). If a "person entitled to compensation" wants to settle a third-party action, and if the settlement is to be for less than the amount of compensation to which the person would be entitled under the LHWCA, the employer remains liable for compensation under the LHWCA to that person only if prior written approval of the settlement is obtained from the employer. 33 U.S.C. 933(g)(1) and (2).<sup>1</sup>

<sup>1</sup> Section 33(g) of the LHWCA, 33 U.S.C. 933(g), provides in relevant part:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person \* \* \* for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation \* \* \* only if

2. Respondent Maggie Yates is the widow of Jefferson Yates, a former employee of petitioner Ingalls Shipbuilding, Inc.<sup>2</sup> Mr. Yates was a pipefitter who was exposed to asbestos during his employment with petitioner. In April 1981, Mr. Yates filed a claim for disability benefits under Section 8 of the LHWCA, 33 U.S.C. 908. In 1982, petitioner admitted compensability of Mr. Yates' claim for disability benefits. In May 1983, petitioner and Mr. Yates entered into a settlement agreement pursuant to 33 U.S.C. 908(i) in which petitioner agreed to pay Mr. Yates a lump sum of \$15,000 and to provide him medical benefits and payment of his attorney's fees. Pet. App. 2.

Meanwhile, in May 1981, Mr. Yates had filed a lawsuit against third parties (23 manufacturers and sellers of asbestos) seeking damages for his injuries that arose out of his exposure to the defendants' asbestos products while he was employed by petitioner. Over time, Mr. Yates entered into partial settlements with several of the defendants in the third-party suit. Pet. App. 62-63. Respondent Maggie Yates was not a party to Mr. Yates' lawsuit for

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written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed \* \* \*.

(2) If no written approval of the settlement is obtained and filed \* \* \* all rights to compensation and medical benefits under this chapter shall be terminated \* \* \*.

<sup>2</sup> Petitioner American Mutual Liability Insurance Company was the workers' compensation carrier for petitioner Ingalls, but is now in receivership. Pet. 2 n.2. Petitioner Mississippi Insurance Guaranty Association has assumed its obligations for payments of benefits under the LHWCA. *Ibid.* All further references to "petitioner" are to petitioner Ingalls, unless otherwise specified.



damages but, as a condition of her husband's settlement with some of the defendants, she released her potential claims against various defendants, including in some instances her potential wrongful death claims. *Id.* at 3. Petitioner was not a party to the third-party lawsuit and did not provide its approval of the settlements. None of the settlements attempted to foreclose petitioner from bringing its own third-party action. *Id.* at 63.

Mr. Yates died in January 1986 from prostate cancer. The parties stipulated, however, that he had asbestosis that contributed to his death. Pet. App. 3. In April 1986, respondent Maggie Yates filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. 909. Mr. Yates' six adult children were not entitled to compensation under the LHWCA because they were not dependent on him and they did not file any LHWCA claims. Pet. App. 3; see 33 U.S.C. 909(b) (providing death benefits for surviving child or children); 33 U.S.C. 902(14) (non-dependent adult is not a "child").

Respondent Yates and her children pursued Mr. Yates' third-party lawsuit against the defendants who had not yet settled. The personal injury suit was converted at that point into a wrongful death action. Pet. App. 3. They entered into three settlements with third-party defendants totalling \$105,821.00 (\$63,680.67 net of attorney's fees and expenses). *Id.* at 3, 23. Unlike the pre-death settlements, respondent Yates, as a widow entitled to compensation under the LHWCA, obtained petitioner's prior written approval of those settlements in accord with Section 33(g)(1) of the LHWCA, 33 U.S.C. 933(g)(1). Pet. App. 3, 23, 64.

3. Petitioner controverted respondent Yates' claim for death benefits and the case was referred to an administrative law judge (ALJ) for a hearing. Pet. App. 58. Petitioner admitted the compensability of respondent's claim, but contended that it was barred by Section 33(g)(1) of the LHWCA because petitioner's prior approval had not been obtained for the pre-death settlements with the third-party defendants. See *id.* at 64-65. The ALJ held that Section 33(g)(1) did not bar respondent Yates' claim, reasoning that respondent was not yet a "person entitled to compensation" for purposes of Section 33(g) when she joined the third-party settlements prior to Mr. Yates' death and therefore was not subject to the employer-approval requirement of Section 33(g). The ALJ ruled that potential widows are not "persons entitled to compensation" because, unlike an injured employee, the spouse of an injured employee has no cause of action for LHWCA benefits unless and until the injured employee dies, and only if the death is from a work-related injury. Pet. App. 68. The ALJ pointed out that, until her husband died, respondent Yates could not have known that his job-related disability would cause his death, or that she would survive him and still be his wife at the time of death. *Ibid.* The ALJ concluded that Congress's intent was clear in Section 9 of the LHWCA that a cause of action for death benefits does not arise until the death of the injured employee, and that respondent Yates could not have been deemed a "person entitled to compensation" until her husband died due to a work-related injury. Thus, the failure to obtain petitioner's prior approval of the pre-death settlements could not bar respondent's claim. Pet. App. 70-71.

The ALJ also addressed the amount of the offset to which petitioner was entitled under Section 33(f) of the LHWCA, 33 U.S.C. 933(f), as a result of the post-death settlements that it had approved. Petitioner claimed that it was entitled to a credit for the total amount of the net proceeds from the post-death settlements, including the amounts paid to Mr. Yates' six surviving children. Pet. App. 64, 82. Respondent Yates claimed, however, that, according to state law, her share of the net proceeds of the settlement constituted only one-seventh of the total (the other six-sevenths going to the children), and that only her share could be offset against petitioner's liability to her for death benefits. *Id.* at 64-65. The ALJ concluded that state law governed the question of the settlement apportionment and that Mississippi law provides for apportionment of the recovery between respondent and the six children. Thus, respondent was entitled to and received only one-seventh of the net settlements. *Id.* at 82-83. Nevertheless, the ALJ allowed petitioner to offset the entire amount of the net settlement proceeds under a different legal theory. Specifically, the ALJ agreed with petitioner's argument that the terms of the settlement agreements themselves should be construed to obligate respondent Yates to give petitioner credit for the entire amount, including the amount received by the children. *Id.* at 84-86.<sup>3</sup>

4. The Benefits Review Board affirmed in part and reversed in part. Pet. App. 20-55. Relying on *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992),

<sup>3</sup> The ALJ also approved an award of funeral expenses under Section 9(a) of the LHWCA and of attorney's fees to respondent's lawyer. Pet. App. 72-82, 87.

which was decided after the ALJ's decision, the Board affirmed the ALJ's ruling that Section 33(g)(1) did not bar respondent Yates' claim. The Board recognized that, in *Cowart*, this Court held that an injured employee is subject to Section 33(g)(1)'s written-approval requirement as a "person entitled to compensation" when his right to recover vests, not when his employer admits liability. Pet. App. 30-31, citing *Cowart*, 505 U.S. at 475-479. The Board noted, however, that the *Cowart* Court did not address the distinct issue of when a potential widow becomes a "person entitled to compensation" for purposes of Section 33(g)(1). Pet. App. 31. The Board emphasized the difference between employees' entitlement to disability benefits under the LHWCA and the right of surviving spouses of former employees to death benefits. *Id.* at 33-34. The Board agreed with the ALJ that the right of a potential widow to receive death benefits does not vest until her spouse dies as a result of a work-related injury. It noted that numerous events could intervene that would affect her rights, including the employee's death due to a non-work-related ailment, the widow's predeceasing the employee, divorce, or a change in the law. *Id.* at 35. Applying the rationale of the *Cowart* decision to respondent Yates, the Board concluded that, because respondent had no vested right to death benefits before her husband died, she became a "person entitled to compensation" only upon the death of her husband, and therefore was not subject to Section 33(g)(1)'s written-approval requirement when she signed the pre-death settlements. *Id.* at 31-37. The Board noted its disagreement with the contrary ruling of the Ninth Circuit in *Cretan v. Bethlehem*



*Steel Corp.*, 1 F.3d 843 (1993), cert. denied, 114 S. Ct. 2705 (1994).

The Board reversed the ALJ's finding that petitioner was entitled to credit the entire net proceeds of the post-death settlements entered into by respondent Yates and her six adult children against its liability for death benefits to Yates alone. The Board agreed with the ALJ that, under Section 33(f), petitioner was entitled to credit only the one-seventh share of the settlements apportioned to respondent, and not the shares that were apportioned to the adult children who were not persons entitled to compensation under the LHWCA. Pet. App. 42. The Board also held, however, contrary to the ALJ, that the settlements did not require respondent to give a greater credit, and further noted that Section 15(b) of the LHWCA, 33 U.S.C. 915(b), would in any event prohibit such a credit as a waiver of compensation rights under the LHWCA. Pet. App. 42-44.<sup>4</sup>

5. The court of appeals affirmed. Pet. App. 1-17. Like the Board, it read *Cowart* to hold that a "person entitled to compensation" means a person whose right to compensation has vested. The court then held that, under *Cowart*, respondent Yates was not a "person entitled to compensation" at the time of the pre-death settlements because her right to recover death benefits did not vest until her husband's death. *Id.* at 10. Because her right to benefits had not vested when she entered into the pre-death settlements, respon-

<sup>4</sup> Administrative Appeals Judge Brown filed a concurring opinion. Pet. App. 45-52. Administrative Appeals Judge Smith also filed a separate opinion, concurring in the affirmance of the Section 33(g)(1) ruling, but dissenting from the reversal of the ALJ's ruling permitting petitioner to offset the recovery received by the adult children. *Id.* at 52-55.

dent's failure to obtain petitioner's prior written approval of those settlements under Section 33(g) did not bar her subsequent claim to benefits. *Id.* at 10-11.

The court of appeals also affirmed the Board's ruling that petitioner could offset only one-seventh of the net post-death settlements, the amount respondent Yates received, against its LHWCA liability to Yates. Relying on the text of Section 33(f), the court agreed with the similar conclusion reached by other courts of appeals and rejected petitioner's argument that it was entitled to offset the entire amount of the settlements, including the recoveries by persons other than respondent. Pet. App. 12-13. Finally, the court affirmed the Board's holding that the post-death settlements did not call for a different result, reasoning that the settlements did not reflect with sufficient clarity an intent to grant petitioner a credit greater than what respondent Yates recovered. *Id.* at 13-16. In a footnote, the court also rejected petitioner's argument that the Director of the Office of Workers' Compensation Programs lacked standing to participate as a respondent. *Id.* at 6 n.2.

## DISCUSSION

Petitioner seeks this Court's review of four questions, three of which concern respondent Yates' claim for death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Petitioner is correct in asserting that there is disagreement between two courts of appeals regarding the first question presented: whether Section 33(g)(1) of the LHWCA, 33 U.S.C. 933(g)(1), which requires a "person entitled to compensation" to obtain an employer's prior written approval of certain settlements with a third party who

may be liable for a work-related injury, applies to an injured employee's relative who settles a potential wrongful death action while the employee is alive. Therefore, although we believe the court of appeals correctly resolved that issue on the merits, we agree with petitioner that plenary review by this Court is warranted with regard to the first question presented. We believe that review of the other three questions is not warranted, however, for the reasons set forth below.

1. Petitioner is correct (Pet. 10) that the decision below conflicts with the Ninth Circuit's decision in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (1993), cert. denied, 114 S. Ct. 2705 (1994), regarding whether an employee's relative, such as Yates, is a "person entitled to compensation" under Section 33(g) of the LHWCA prior to the death of the employee. The court of appeals in this case, correctly in our view, held that respondent Yates was not a "person entitled to compensation" under the LHWCA prior to her husband's death because her right to death benefits under the LHWCA did not vest until her husband died due to a work-related injury. It follows that her failure to obtain prior written approval from petitioner cannot bar her claim for death benefits under the LHWCA. In *Cretan*, by contrast, the Ninth Circuit held that a widow's claim for death benefits under the LHWCA was barred because, prior to her husband's death, she had entered into settlements with third parties without the consent of her husband's employer. 1 F.3d at 843.

The court of appeals' decision in this case is consistent with the Court's interpretation of the LHWCA set forth in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992). There, the Court

explained that "the normal meaning of entitlement includes a right or benefit for which a person qualifies." *Id.* at 477. Prior to her husband's death, respondent Yates did not qualify for LHWCA death benefits. Her qualification for such benefits was contingent on a number of statutory prerequisites that had not yet occurred and were not certain to occur. Specifically, her husband had to die from a work-related injury or illness, 33 U.S.C. 909, and she had to survive him and qualify as an eligible "widow," 33 U.S.C. 902(16). Just as the claimant for disability benefits in *Cowart* "became a person entitled to compensation at the moment his right to recovery vested," 505 U.S. at 477, so respondent Yates became entitled to death benefits under the LHWCA only when her right to recovery vested, *i.e.*, at the time of her husband's death due to a work-related illness.

The court of appeals correctly applied that "normal meaning" of "entitled" in this case. The central holding in *Cowart* is that entitlement within the meaning of 33 U.S.C. 933(g) attaches only when a right to recover LHWCA benefits vests. Pet. App. 10. Petitioner's focus (Pet. 11-13) on Section 33(g)'s policy of protecting employers from improvident third-party settlements entered into by "person[s] entitled to compensation" does not justify a departure from the normal meaning of the statutory text.

Although we agree with the court of appeals' ruling, we also agree with petitioner that review by this Court would be appropriate in light of the disagreement between the circuits.<sup>5</sup> In our brief in

<sup>5</sup> Both the Fifth and Ninth Circuits have rejected suggestions for rehearing en banc. Pet. App. 18-19; Brief for the



opposition to the petition for a writ of certiorari in *Cretan*, we expressed our disagreement with the Ninth Circuit's ruling, but we urged denial of the petition because *Cretan* was the first appellate decision after *Cowart* to construe Section 33(g) and there was not yet any disagreement among the courts of appeals. The correct interpretation of Section 33(g) is an important and recurring issue, however. For example, petitioner has had more than 3,000 asbestos-related claims filed against it that petitioner asserts should be barred by Section 33(g). See *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 131 n.2 (5th Cir. 1994). Many of those claims are likely to involve settlements by individuals who had no vested right to compensation at the time of the settlement. Therefore, in light of the circuit conflict that has now arisen, review by this Court is warranted. Cf. *Cowart*, 505 U.S. at 475 (Court "granted certiorari because of the large number of LHWCA claimants who might be affected by the Court of Appeals' decision").

2. Petitioner contends (Pet. 15-17) that the Court also should grant review to determine whether the Director of the Office of Workers' Compensation Programs had standing to participate as a respondent in the court of appeals. Petitioner correctly notes that, in ruling that the Director had standing as a respondent (Pet. App. 6 n.2), the court of appeals rejected a line of cases in which the Fourth Circuit had held that the Director does not automatically have standing in the court of appeals as a party respondent. See Pet. 16, citing *I.T.O. Corp. of Baltimore v.*

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Federal Respondent in Opposition at App. 1a-3a, *Cretan v. Director, OWCP*, 114 S. Ct. 2705 (1994) (No. 93-1446).

*Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977), reinstating in pertinent part, 542 F.2d 903 (4th Cir. 1976), vacated and remanded, 433 U.S. 904, cert. denied, 433 U.S. 908 (1977). Petitioner (Pet. 17) and the court of appeals (Pet. App. 6 n.2) both point out that this Court left open the question of the Director's party-respondent status in its recent decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 115 S. Ct. 1278, 1284 & n.2 (1995).<sup>6</sup>

The presence of the claimant, respondent Yates, as a respondent in the court of appeals and in this Court makes it unnecessary for the Court to address the issue of the Director's status as a respondent in this case. See *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988) (unnecessary to decide if Director is proper respondent where all issues on merits are presented by claimant and employer); cf. *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990) (unnecessary to decide Department of Labor's standing as petitioner where other petitioner had standing); *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 305 (1983)

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<sup>6</sup> To petition for review, a person must be "adversely affected or aggrieved by a final order of the [Benefits Review] Board." 33 U.S.C. 921(c). In *Harcum*, the Court held that the Director did not have a right to petition under Section 921(c) when she relied "solely upon the mere existence and impairment of [the Director's] governmental interest" as administrator of the LHWCA. 115 S. Ct. at 1285. The LHWCA does not similarly limit who may be a respondent in the court of appeals, however, and this Court did not suggest that a "governmental interest" would be insufficient to confer respondent status. See *id.* at 1284 n.2 ("Obviously, an agency's entitlement to party respondent status does not necessarily imply that agency's standing to appeal").

(presence of claimant and employer as parties satisfies constitutional dimension of standing). Moreover, the fact that the Fourth Circuit has taken a different approach toward the Director's role as a respondent has had little practical effect on the Director's LHWCA enforcement. The Fourth Circuit routinely allows the Director to participate as an intervenor, thereby giving the Director the same party status that she has in the other courts of appeals. See, e.g., *Parker v. Director, OWCP*, 75 F.3d 929, 934-935 (4th Cir. 1996); *I.T.O. Corp. v. Pettus*, 73 F.3d 523, 526 n.1 (4th Cir. 1996) (Director "has shown good cause to intervene" because she administers and enforces the LHWCA and the court defers to her interpretation); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1135 n.1 (4th Cir. 1995). Thus, no conflict has arisen, as a practical matter, regarding whether the Director may "actively respond" to a petition for judicial review.

In any event, we believe that the court of appeals correctly adhered to circuit precedent holding that the Director is properly a respondent under Rule 15(a) of the Federal Rules of Appellate Procedure, which expressly requires a petitioner seeking review of an agency order to name the agency as a respondent.<sup>7</sup> Pet. App. 6 n.2, citing *Ingalls Shipbuilding*

<sup>7</sup> Rule 15(a) provides in relevant part:

(a) **Petition for Review of Order; Joint Petition.**  
Review of an order of an administrative agency \* \* \* must be obtained by filing with the clerk of a court of appeals that is authorized to review such order \* \* \* a petition [which] \* \* \* must name each party seeking review [and] \* \* \* must designate the respondent and

*Div. v. White*, 681 F.2d 275, 281-284 (5th Cir. 1982), overruled on other grounds, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984); see also *Thornton v. Brown & Root, Inc.*, 707 F.2d 149, 154 (5th Cir. 1983), cert. denied, 464 U.S. 1052 (1984). Petitioner sought review of an order of the Department of Labor's Benefits Review Board under Section 21(c) of the LHWCA, 33 U.S.C. 921(c). Pursuant to his authority to appoint attorneys to represent him "in any court proceedings under section 921," 33 U.S.C. 921a, the Secretary has specified that the Director, as the Secretary's designee responsible for enforcing the LHWCA, is the proper party to appear on behalf of the Secretary in all such review proceedings. 20 C.F.R. 802.410(b); see also 20 C.F.R. 701.201, 701.202(a) (delegations of Secretary's authority); cf. *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.) (discussing adjudicative functions of Benefits Review Board, whose members are appointed by and subject to removal by the Secretary), cert. denied, 462 U.S. 1119 (1983). As the Secretary's representative, the Director's views are entitled to deference. See, e.g., *Cowart*, 505 U.S. at 476 (recognizing deference generally owed to Director rather than to Board); *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 793-795 (2d Cir. 1992); *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 208-209 (4th Cir. 1990). Deference would mean little if the Direc-

the order or part thereof to be reviewed. \* \* \* In each case the agency must be named respondent. \* \* \*

Fed. R. App. P. 15(a).



tor had no right to express her views on the underlying issues.<sup>8</sup>

3. Petitioner contends (Pet. 17-22) that, with regard to the three settlements entered into by respondent Yates (with petitioner's consent) after her husband's death, Section 33(f) of the LHWCA entitles it to offset against its LHWCA liability to respondent Yates not only the net amount she received, but also the net proceeds received by Mr. Yates' adult children in those settlements.

The plain language of Section 33(f) prohibits petitioners' requested offset. See Pet. App. 12-13. Section 33(f) provides that, when a "person entitled to compensation" institutes third-party proceedings, the employer must pay compensation "equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person." 33 U.S.C. 933(f). The "net amount" is "the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings." *Ibid.* (emphasis added). Thus, the only "net amount" that reduces an employer's LHWCA liability

<sup>8</sup> Several other courts of appeals have held that the Director is properly a respondent to a petition for review of a Board decision. See *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 1080 (9th Cir. 1988); *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 481-485 (D.C. Cir. 1982); see also *Simpson v. Director, OWCP*, 681 F.2d 81, 82 (1st Cir. 1982), cert. denied, 459 U.S. 1127 (1983); *Insurance Co. of North America v. Gee*, 702 F.2d 411, 413 n.2 (2d Cir. 1983); *Curtis*, 849 F.2d at 807 n.4 (noting strength of *Shahady* rationale, but reserving question). Some of the decisions recognizing the Director's status as a respondent are based on 33 U.S.C. 921(c) and some are based solely on Federal Rule of Appellate Procedure 15(a).

is the net amount received by a "person entitled to compensation."

The court of appeals' decision is consistent with the views of the other courts of appeals that have addressed the issue. See Pet. App. 12-13; *I.T.O. Corp. v. Sellman*, 967 F.2d 971, 972-973 (4th Cir. 1992), cert. denied, 507 U.S. 984 (1993); *Force v. Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991) ("The Director's position is a reasonable interpretation of the statutory language"); see also *Hill v. Arrien*, 336 F. Supp. 799, 803 (E.D. Pa. 1972), aff'd mem., 474 F.2d 1339 (Table), vacated in part, 475 F.2d 1395 (3d Cir. 1973) (Table); *Holley v. The Manfred Stansfield*, 186 F. Supp. 805, 808 (E.D. Va. 1960); 2A Arthur Larson, *The Law of Workmen's Compensation* § 74.31(f) (1995). Further review of the issue is not warranted.

4. Petitioner contends (Pet. 22-24) that the terms of the particular settlement agreements entered into by respondent Yates constitute another basis for awarding petitioner an offset against its liability to respondent in an amount equal to the total recovered by respondent and Mr. Yates' adult children. That fact-bound issue does not merit review by this Court. The court of appeals reasonably interpreted the settlements as reflecting an intent to give a credit only to the extent that any compensation payments constitute a lien against a third-party recovery. Pet. App. 14. The settlement language purporting to give a credit against settlement sums subject to a compensation lien reflects an intent to limit the credit "to the portion of the settlement paid to a party entitled to compensation." *Id.* at 15. Only respondent Yates

was a person entitled to compensation; Mr. Yates' children were not entitled to such statutory benefits.<sup>9</sup>

### CONCLUSION

The petition for a writ of certiorari should be granted limited to question one. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

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<sup>9</sup> Contrary to petitioner's argument (Pet. 22-24), the court of appeals properly rejected the ALJ's contrary construction of the settlements. The ALJ recognized that some settlement language did not support his construction, Pet. App. 85-86, opined that the settlements as he construed them may be deemed "unconscionable and void as between employer and claimant," and reached his construction based largely on a misinterpretation of a prior court of appeals decision. See *id.* at 86, citing *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir.), cert. denied, 484 U.S. 976 (1987). Moreover, as the Director argued below, the ALJ reached a result at odds with Sections 15(b) and 16 of the LHWCA, which prohibit waivers of rights to compensation. See 33 U.S.C. 915(b), 916.



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Supreme Court, U.S.

F I L E D

MAY 8 1996

No. 95-1081

CLERK

In The  
**Supreme Court of the United States**  
October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN  
MUTUAL LIABILITY INSURANCE COMPANY, IN  
LIQUIDATION, BY AND THROUGH THE MISSISSIPPI  
INSURANCE GUARANTY ASSOCIATION,

*Petitioners,*

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, U. S. DEPARTMENT OF LABOR,  
AND MAGGIE YATES (Widow of Jefferson Yates),

*Respondents.*

On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit

**REPLY BRIEF OF PETITIONERS**

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## REPLY BRIEF OF PETITIONERS

COME NOW, the Petitioners, Ingalls Shipbuilding, Inc., and American Mutual Liability Insurance Company, in liquidation, by and through the Mississippi Insurance Guaranty Association, and pursuant to Supreme Court Rules 15.6 and 17.5, file this their reply to the briefs in opposition to their Petition for Writ of Certiorari. Briefs in opposition have been filed by both Maggie Yates and the Director of the Office of Workers' Compensation Programs, U.S. Department of Labor (hereinafter Director), although the Director agrees with the Petitioners that a writ of certiorari should issue as to the first issue raised by Petitioners.

## 1. 33(g)

The first issue raised by Petitioners is that certiorari should be granted to resolve the conflict between the Fifth and Ninth Circuits regarding whether § 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 933(g), should operate to bar the death claim of a widow who settled her potential third party wrongful death case prior to the death of her husband without the employer's consent.

The Brief for the Director agrees with Petitioners that certiorari should be granted on this issue to resolve the conflict between the Fifth Circuit's decision in the instant claim and the Ninth Circuit's decision in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705 (1994). The Director also correctly notes that this Court's resolution of the issue could potentially affect thousands of workers' compensation claims against Ingalls Shipbuilding, Inc., alone. (Brief at p. 10) [See *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 131 n.2 (5th Cir. 1994).]

The Brief in Opposition of Respondent Maggie Yates also acknowledges that the decision in the instant claim



creates a conflict between the Fifth and Ninth Circuits, which is not "unimportant." (See Brief at pp. 10-11.) However, she suggests that conflicts between additional circuits should be allowed to arise before this Court exercises its jurisdiction. However, the Brief of the private Respondent fails to consider the immediate impact this Court's decision would have on the large number of similar LHWCA claims and it fails to consider that the majority of Longshore cases are seemingly resolved in the Fifth and Ninth Circuits.

Maggie Yates' Brief in Opposition also suggests that the employer is not prejudiced by the actions of Mrs. Yates prior to her husband's death in releasing third party defendants in exchange for inadequate settlement proceeds, since the employer has an independent cause of action against the third party defendants which caused its damages pursuant to *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969). However, the widow's brief does not dispute that the Petitioners would be forever barred from seeking subrogation against the third party defendants because of the widow's unauthorized settlements and release. *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985).

Finally, the private Respondent asserts that the decedent's wife had no vested claim to death benefits prior to her husband's death and, consequently, she could not have been a "person entitled to compensation" for purposes of the forfeiture provisions of § 33(g). In explaining that certain contingencies could have occurred that would have prevented the claim for death benefits from ever vesting, Mrs. Yates asserts that she could have predeceased her husband, divorced him, or he could have died from unrelated causes. However, Mrs. Yates' argument fails to recognize that those same contingencies would have prevented her from ever making a claim for wrongful death against the third party defendants or the

Petitioners. Nevertheless, she was able to settle her *potential* claim prior to the death of her husband. In doing so, she assumed the position of a "person entitled to compensation" and accordingly, she should bear the responsibilities of that position, which would require her to obtain the employer's consent to the third party settlement. See *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992).

For the foregoing reasons, this Court should grant certiorari to resolve the conflict between the circuits regarding the § 33(g) issue.

## 2. Standing of the Director, OWCP

In the Petition for Writ of Certiorari, the Petitioners note the conflict between the Fourth and Fifth Circuits regarding whether the Director, OWCP, has standing to actively respond to an appeal in which it has no pecuniary interest. Mrs. Yates asserts that issue is not sufficiently important to merit certiorari, since the Court of Appeals for the Fifth Circuit resolved the issue in a footnote. However, numerous courts have been perplexed by this issue. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 807, n.4 (3rd Cir. 1988). Furthermore, the Court of Appeals for the District of Columbia has stated as follows concerning the issue:

At the outset we acknowledge that no authority easily disposes of this motion. The statutory scheme and regulation upon which the DOWCP principally relies do not, in so many words, resolve this issue; the Supreme Court's statement on this point is also equivocal. The legislative history is unhelpful. Finally, Rule 15(a), if it applies at all, begs the question. Thus it is not surprising that the circuits have split almost evenly as to the proper role of the Director and Board in Section 921(c) proceedings.

*Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 481-2 (D.C. Cir. 1982).

Consequently, the employer would assert that the issue of the Director's standing to respond is an important issue which has perplexed numerous circuits and compels final resolution by this Court.

The Director, OWCP, also asserts that the issue of its standing does not merit resolution by this Court, despite its admission that the Fifth Circuit's decision in the instant claim conflicts with a line of cases in the Fourth Circuit. (See Director's Brief, pp. 12-13.) In support of his position, the Director asserts that his standing is irrelevant where all issues on the merits are presented by the claimant and the employer. (See Brief, p. 13.) In support of his contention, the Director cites the cases of *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 807, n.4 (3rd Cir. 1988); *United States Department of Labor v. Triplett*, 494 U.S. 715, 719 (1990); and *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 305 (1983). However in *Curtis*, there was no objection to the standing of the Director; the issue was not fully briefed; and the Director appeared in large part on behalf of the petitioner, despite a lack of any financial interest in the case, contrary to this Court's recent decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1278, 131 L.Ed. 2d 160 (1995).

The *Triplett* case is also inapplicable. It did not deal with the issue of the Director's right to appear as a respondent, since the Director appeared on the side of the petitioner. Secondly, *Triplett* did not involve an issue between an employer and employee. Instead, it was an issue between a committee on legal ethics and a plaintiff's attorney. Third, rather than making an automatic appearance as a respondent, as in the present case, the Director in *Triplett* intervened at the request of the lower court. Finally, *Triplett*, unlike the case at bar, involved an important governmental interest which the Director was

obliged to protect, since the lower court had found part of the implementing act unconstitutional.

The Director's reliance on the *Perini* case is also misplaced. In *Perini*, the Director was the sole petitioner, despite the fact that the government had no financial interest in the outcome of the case, which would today violate this Court's opinion in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, cited *supra*. Furthermore, the employer/respondent never objected to the Director's standing before the Court of Appeals, and the injured worker appeared as a respondent but argued in favor of the Director. 459 U.S. at 305.

The Director also asserts that consideration of his automatic standing as a respondent is not necessary in this Court since the Director could intervene in the case pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. See also *I.T.O. Corporation of Baltimore v. Benefits Review Board*, 542 F.2d 903, 909 (4th Cir. 1976). However, the mere fact that an entity could possibly intervene has no bearing on the issue of whether it should have been a party in the first place. Furthermore, allowing intervention pursuant to Rule 24(b) still requires some interest in the outcome of the case and a discretionary decision by the court which takes into consideration any undue delay or prejudice the intervention would cause the original parties. See Rule 24(b) of the Federal Rules of Civil Procedure. Consequently, absent a legitimate interest, federal agencies have often been denied a right to intervene. *E. I. du Pont de Nemours & Co. v. Lyles & Lang Construction Co.*, 219 F.2d 328 (4th Cir. 1955), cert. denied, 349 U.S. 956 (1955); *Industria E. Commerico De Minerios S. A. v. Nova Genuesis Societa*, 172 F.Supp. 569 (E.D. Va. 1959), 197 F.Supp. 699, aff'd, 310 F.2d 811 (4th Cir. 1962); *Jacobs v. Volney Felt Mills, Inc.*, 47 F.Supp. 493 (N.D. Ind. 1942). Furthermore, the courts have indicated a reluctance to allow intervention by the government in a private dispute where the private parties adequately address



the issues. *General Electric Co. v. Hygrade Sylvania Co.*, 45 F.Supp. 714 (S.D.N.Y. 1942); *Woburn Degreasing Co. v. Spencer Kellogg & Sons, Inc.*, 3 F.R.D. 7 (W.D.N.Y. 1943). In fact, this rationale has been used as a basis to deny standing to the Benefits Review Board in a case before the Court of Appeals arising under the LHWCA. *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975); see also *Ingalls Shipbuilding, Div. Litton Systems, Inc. v. White*, 681 F.2d 275, 283 (5th Cir. 1982), *overruled on other grounds*, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 818 (1984).

Finally, the Director asserts in its response brief that the Court of Appeals for the Fifth Circuit was correct in finding that Rule 15(a) of the Federal Rules of Appellate Procedure requires that the Director, on behalf of the agency, be automatically entitled to respondent status. Surely, Rule 15(a) does not create standing absent the Director being able to show that his statutory interests, as discussed in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, cited *supra*, are present in any case where he claims standing. Further, there is a split in the circuits on this issue. For example, the Court of Appeals for the District of Columbia holds that Rule 15(a) of the Federal Rules of Civil Procedure does not apply to the Director's standing in claims under the LHWCA, and instead, it applies only where the agency that made the decision is an active litigant. *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 484 (D.C. Cir. 1982).

For the foregoing reasons, and particularly because of the widespread conflict in the circuits on how to resolve the issue of the Director's standing as a respondent, the Petitioners herein would respectfully assert that certiorari should be granted on the issue regarding the standing of the Director as a respondent.

### 3. § 33(f)

The third issue on which Petitioners seek certiorari concerns § 33(f) of the LHWCA, 33 U.S.C. § 933(f). Petitioners assert that the plain language of § 33(f) allows them to be reimbursed from any net amount paid by the third party defendants. However, both Respondents assert that the plain language favors their position that only the amount recovered by the "person entitled to compensation" may be used to reduce the employer's liability, and that there is no split in the circuits on the issue. Section 33(f) provides, in pertinent part, that "... the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered *against such third person*." 33 U.S.C. § 933(f) (Emphasis added.)

The plain language of the statute merely requires that the "person entitled to compensation" institute the third party proceedings and that thereafter, the employer is entitled to recover the entire net amount recovered "against such third person." The employer is not limited to recovering only the net amount to be received by the "person entitled to compensation."

The Respondents' interpretation of § 33(f) would also be contrary to the purpose of § 33 of the LHWCA, which is to place full liability on the responsible third party and make the employer whole. *Peters v. North River Insurance Co. of Morristown, NJ*, 764 F.2d 306 (5th Cir. 1985). Because Mr. Yates died, it makes little sense to give his family greater rights and Ingalls lesser ones with respect to the third party recovery. This becomes clear when one considers that had Mr. Yates, the deceased employee and original claimant, lived through the third party settlements in issue, he would have had to reimburse Ingalls without being able to parcel the proceeds to his wife or children to avoid reimbursement of Ingalls' lien.

Finally, the Respondents' interpretation of § 33(f) would be contrary to long-standing case law holding that the employer's lien is inviolable. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980); *Bartholomew v. CNG Producing Co.*, 862 F.2d 555 (5th Cir. 1989).

For the foregoing reasons, Petitioners would assert that certiorari should be granted to resolve the question as to the amount of the setoff to which the Petitioners are entitled pursuant to § 33(f) of the LHWCA.

#### 4. Contractual Basis

The final ground upon which Petitioners seek certiorari is that the releases in the third party litigation themselves contractually obligated the widow to allow the employer to set off its liability by all net amounts received from the third party defendants, including amounts received by the non-dependent heirs-at-law. In her brief, the widow argues that this Court should not grant certiorari for review of factual determinations. However, it should be noted that it was the Court of Appeals for the Fifth Circuit which made the finding of fact that the releases did not "clearly and unambiguously" allow the employer a credit for all net amounts paid. Findings of fact should be made by the trial judge. Furthermore, those findings should be respected by the appellate courts. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 189 (5th Cir. 1992). In the case at bar, the trial judge weighed conflicting evidence and found an intent to allow the employer to set off its liability to the widow by all net amounts received from the third party defendants, including the amounts received by the non-dependent heirs-at-law. Accordingly, the Court of Appeals for the Fifth Circuit went beyond its appellate function when it substituted its judgment on the facts for that of the trial judge. See *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). Also, since virtually identical releases have

been executed by thousands of plaintiffs who were allegedly exposed to asbestos with this employer alone, this Court's interpretation of the releases could potentially affect thousands of cases and vast sums of third party disbursements.

Secondly, the widow asserts that the contracts should be interpreted pursuant to state law. (See Brief of Widow at p. 18.) However, where they conflict, state law will be preempted by the Longshore Act. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).

The widow also asserts that estoppel cannot be raised as a defense. In the instant claim, the widow provided documentation of third party settlements to the employer, which noted that the employer would be entitled to set off its liability for benefits by the full net amount paid by the third party defendant. Those documents clearly indicate that the Respondent acknowledged that Petitioners were entitled to set off the full net amount received from the third party defendant, including the amount received by non-dependent heirs-at-law.

Next, the widow asserts that the Petitioners cannot rely upon a contract to which it was not a party unless it can show that the contract was for its direct benefit. (See Widow's Brief at p. 19.) However, the Fifth Circuit has held that an employer and carrier can enforce an agreement between a claimant and a third party defendant requiring reimbursement of its lien. See *Speaks v. Trihora Lloyd P.T.*, 838 F.2d 1436 (5th Cir. 1988).

Finally, the widow asserts that §§ 15 and 16 of the LHWCA, which disallow waivers of compensation, would make the contracts in the instant claim invalid. However, the agreements in the instant claim were not between the employer and employee, as contemplated by §§ 15 and 16 of the Act. Instead, they were between the widow and the third party defendant. Finally, the Court of Appeals did not consider the applicability of §§ 15 and



16 to the instant claim and thus these arguments should not be considered on appeal by this Court.

### CONCLUSION

For the foregoing reasons, Petitioners would request that this Honorable Court grant certiorari on all four issues.

Respectfully submitted,

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**Supreme Court of the United States**  
October Term, 1995

INGALLS SHIPBUILDING, INC. AND  
AMERICAN MUTUAL LIABILITY INSURANCE  
COMPANY, IN LIQUIDATION, BY AND  
THROUGH THE MISSISSIPPI  
INSURANCE GUARANTY ASSOCIATION,

*Petitioners,*

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, U. S. DEPARTMENT OF LABOR, AND  
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**PETITIONERS' BRIEF ON THE MERITS**

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**QUESTIONS PRESENTED**

1. Does § 33(g) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, bar the compensation claim of a covered employee's wife when she, without the employer's approval, enters into wrongful death settlements with third parties before her husband's death for an amount less than the compensation benefits to which she would be entitled?

2. Does the Director of the Office of Workers' Compensation Programs, U. S. Department of Labor, have standing to respond in the U. S. Courts of Appeals in opposition to a private party with respect to a matter in which the Director has no interest?

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## PETITIONERS' BRIEF ON THE MERITS

COME NOW, the Petitioners, Ingalls Shipbuilding, Inc.,<sup>1</sup> and American Mutual Liability Insurance Company, in liquidation, by and through the Mississippi Insurance Guaranty Association, and pray that the decision of the United States Court of Appeals for the Fifth Circuit entered on October 3, 1995, be reversed.

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 OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit, upon which certiorari has been granted, was entered on October 3, 1995, is reported at 65 F.3d 460, and is reprinted in the Appendix to the Petition for Writ of Certiorari (hereinafter Pet. Writ Cert. App.) at pp. 1-17. Petitioners' Suggestion for Rehearing *En Banc* was denied by the Fifth Circuit on November 22, 1995. (Pet. Writ Cert. App. 18-19). The decision of the Fifth Circuit affirms the decision of the Benefits Review Board in *Yates v. Ingalls Shipbuilding, Inc.*, 28 BRBS 137 (1994); (Pet. Writ Cert. App. 20-55). The decision of the Benefits Review Board affirmed in part and reversed in part the decision of the Administrative Law Judge in *Yates v. Ingalls Shipbuilding, Inc.*, 26 BRBS 174 (ALJ) (1992); (Pet. Writ Cert. App. 56-88).

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<sup>1</sup> Ingalls Shipbuilding, Inc., is a subsidiary of Litton Industries, Inc.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 3, 1995. Jurisdiction of this Court to review the decision of the Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. § 1254(1).

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## STATUTES INVOLVED

This case involves interpretations of the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §§ 901, *et seq.* The specific statute of the LHWCA which is pertinent to this appeal involves 33 U.S.C. § 933, subsections (f) and (g), which are reprinted at Pet. Writ Cert. App. pp. 89-90.

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## STATEMENT OF THE CASE

Jefferson Yates was allegedly exposed to asbestos while employed with Ingalls Shipbuilding, Inc. from 1953 until 1967.<sup>2</sup> On March 23, 1981, he was diagnosed as having an asbestos-related disease. (RX-3, p. 1)<sup>3</sup>. On April

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<sup>2</sup> The compensation carrier for Ingalls Shipbuilding, Inc. was American Mutual Liability Insurance Company, which is now in receivership. The obligations of American Mutual under the LHWCA have been assumed by The Mississippi Insurance Guaranty Association. Ingalls and American Mutual will hereafter be referred to jointly as "Ingalls."

<sup>3</sup> The following abbreviations are used throughout Petitioners' Brief when citing evidence of record: Joint exhibit - "JX", Ingalls' exhibit - "RX", Transcript of the hearing - "T".

16, 1981, he filed a compensation claim against Ingalls under the LHWCA. (RX-4)<sup>4</sup>. On May 26, 1981, he filed a third-party lawsuit in the United States District Court for the Southern District of Mississippi, Southern Division, seeking damages against 23 asbestos manufacturers for his asbestos-related disease. (RX-7).

Between May 1981 and January 1984, Mr. and Mrs. Yates, while being represented by the same attorneys who represented Mr. Yates in his LHWCA claim against Ingalls, entered into eight third party settlements with certain asbestos manufacturers. (RX-13; RX-23). They did so without the consent of Ingalls. (T-10; T-31; RX-20, pp. 7-12). Mr. and Mrs. Yates executed releases in conjunction with each of the third party settlements. (RX-13). In six of the eight settlements, Mrs. Yates released all claims for the potential wrongful death of her husband as an essential pre-condition of the settlements. (RX-13). For example, the settlement with Garlock, Inc. on May 20, 1982, states:

[A]nd the undersigned do hereby agree that *any claims, demands, actions, or causes of actions that they or either of them may now have or hereafter have* against Garlock, Inc. are wholly and forever satisfied and extinguished, whether the full extent of exposure of the undersigned *Jefferson T. Yates or Maggie Yates* to any product manufactured, sold or distributed by Garlock, Inc., if

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<sup>4</sup> Several thousand claimants have filed similar asbestos compensation claims against Ingalls under the LHWCA. See *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994).



any, or the extent of the harm or damages caused thereby is now fully known or not.

(RX-13, p. 8) (emphasis added).

The release dated January 30, 1984 with GAF Corporation states:

For and in consideration of the sum of Six Thousand And No/Hundred (\$6,000.00) Dollars, cash in hand paid, the undersigned, J. T. Yates, for and on behalf of himself individually and on behalf of his heirs, administrators, executors, personal representatives and assignees *joined herein by his wife*, does hereby release and forever discharge GAF Corporation ("GAF"), its officers, agents, employees, successors, predecessors, including the Ruberoid Company ("Ruberoid"), insurers and re-insurers, from *any and all claims, causes or rights of actions, demands and damages of every kind or nature, including all present and/or future claims by the undersigned spouse and/or other heirs of J.T. Yates for loss of consortium, services, and/or wrongful death of J. T. Yates.*

(RX-13, p. 20) (emphasis added).

The release dated January 30, 1984 with Owens-Illinois states:

For and in consideration of the sum of Three Thousand and No/100 (\$3,000.00) Dollars, plus accrued interest, cash in hand paid, the undersigned, Jefferson Yates, acting for and on behalf of himself individually and on behalf of his heirs, administrators, executors, personal representatives, and assigns, *joined herein by his wife, Maggie Yates*, does hereby release and forever discharge Owens-Illinois Glass Company

and Owens-Illinois, Inc. ("Owens-Illinois"), its officers, agents, employees, predecessors, insurers, and reinsurers, from any and all claims, causes or rights of action, demands and damages of every kind or nature, including all present and/or future claims by the undersigned spouse, and/or other heirs of Jefferson Yates for loss of consortium, services, and/or *wrongful death of Jefferson Yates* which the undersigned may now or hereafter have.

(RX-13, p. 34) (emphasis added).

Mr. Yates died of prostate cancer on January 28, 1986. The parties stipulated that his exposure to asbestos contributed to his death. (JX-1; RX-15; RX-16). On April 22, 1986, Mrs. Yates, respondent herein, filed a compensation claim for death benefits against Ingalls under § 9 of the LHWCA. 33 U.S.C. § 909 (1986); (RX-17).

Ingalls controverted the LHWCA claim of Mrs. Yates because, among other reasons, she failed to obtain the approval of Ingalls as required by § 33(g)(1) to the third party settlements into which she and her husband entered before his death. (JX-1).

On April 23, 1992, the Administrative Law Judge held that the LHWCA claim of Mrs. Yates was not barred by her unapproved third party settlements finding that she was not a "person entitled to compensation" and therefore not bound by the employer approval requirements of § 33(g)(1) because her husband was alive at the time of such settlements. (See Pet. Writ Cert. App. at pp. 56-88). On June 29, 1994, the Benefits Review Board affirmed the Administrative Law Judge's holding that

Mrs. Yates' claim was not barred by § 33(g)(1). (See Pet. Writ Cert. App. at pp. 20-55).

Pursuant to 33 U.S.C. § 921(c), Ingalls appealed the Benefits Review Board's decision to the U.S. Court of Appeals for the Fifth Circuit. During the proceedings before the Fifth Circuit, the Director of the Office of Workers' Compensation Programs, U.S. Department of Labor ("Director"), responded in opposition to Ingalls even though the Director had no statutory or financial interest in the case. Because of his lack of standing, Ingalls objected to the involvement of the Director in the appeal.

On October 3, 1995, the Fifth Circuit affirmed the Benefits Review Board. (See Pet. Writ Cert. App. at pp. 1-17). In its decision, a panel of the Fifth Circuit, citing this Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) (see Pet. Writ Cert. App. pp. 101-142), held that the LHWCA claim of Mrs. Yates did not vest until the death of Mr. Yates because she was not a "person entitled to compensation" within the meaning of § 33(g) at the time of the unapproved pre-death settlements. (See Pet. Writ Cert. App. at pp. 10-11). The panel also held that the Director had standing to involve himself in this appeal citing *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275 (5th Cir. 1982) (see Pet. Writ Cert. App. at pp. 143-180), *rev'd on other grounds, Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.), *cert. denied*, 469 U.S. 818 (1984), notwithstanding the recent decision of this Court in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S.Ct. 1278 (1995) (see Pet. Writ Cert. at pp. 198-224), which held that the Director had no

standing to appeal a claim in which he had no cognizable interest. (Pet. Writ Cert. App. p. 6).

Certiorari has been granted to review the decision of the U.S. Court of Appeals for the Fifth Circuit with respect to the proper application of § 933(g) of the LHWCA and the Director's standing to involve himself in this appeal as a respondent and as an active party opponent.

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#### SUMMARY OF THE ARGUMENT

##### I. A WIFE WHO SETTLES HER CLAIMS FOR THE WRONGFUL DEATH OF HER HUSBAND WITHOUT THE CONSENT OF HIS EMPLOYER IS BARRED BY SECTION 33(g)(1) OF THE LHWCA FROM RECEIVING COMPENSATION BENEFITS FROM THE EMPLOYER REGARDLESS OF WHETHER THE UNAPPROVED SETTLEMENTS OCCURRED BEFORE OR AFTER THE HUSBAND'S DEATH.

A potential widow who settles her wrongful death claims before the death of her husband must obtain the consent of her husband's employer under the approval requirements of § 33(g). Absent consent and pursuant to § 33(g)(1), her compensation claim against the employer will be barred. This interpretation is consistent with the plain language of § 33(g)(1) which makes it applicable to persons who "would be entitled to compensation" under the LHWCA. This interpretation is also consistent with the underlying purpose of § 33(g) which is to protect the employer when a worker or those claiming through him



settle third party tort claims for less than the compensation to which he or they would be entitled under the LHWCA. This interpretation is also consistent with the decision of the U.S. Court of Appeals for the Ninth Circuit in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 846 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), which determined that "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment." This is further consistent with the purpose of § 33(g)(1) which is to protect the employer against workers entering into inordinately low settlements which would increase the employer's compensation liability to the worker. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482-483 (1992).

The Fifth Circuit's application of the "vesting" language found in *Cowart*, so as to allow Mrs. Yates to enter into unapproved pre-death third party settlements for less than the compensation to which she would be entitled while preserving her unencumbered ability to obtain additional compensation benefits from Ingalls, is inconsistent with the plain language of § 33(f) and (g). Instead of finding that her LHWCA compensation claim is derivative of her husband's injury, and instead of following the natural reading of § 33(g) which requires anyone who "would be entitled" to compensation to secure employer approval of the settlements, the Fifth Circuit held that Mrs. Yates was not bound by § 33(g)(1) because her husband was alive at the time of such settlements. The prejudicial effect on Ingalls, however, is the same whether her unapproved settlements were before or after his death. Such a narrow interpretation of § 33(g)(1) has opened the door to limitless opportunities for relatives of workers with occupational diseases to negotiate third

party settlements before the worker's death for less than they would be entitled under the LHWCA and then later hold the employer responsible for the difference, no matter how improvident the settlements were, and no matter how little was paid in settlement.

Further, the narrow interpretation by the Fifth Circuit of the phrase "person entitled to compensation" in § 33(g)(1) if consistently applied to the same phrase in § 33(f) would also defeat the right of an employer to a statutory credit or setoff against its compensation liability to the extent of the net third party recoveries received by the worker or those claiming through him. In effect, such a "consistent interpretation" would render such settlements totally useless and of no account to employers. To allow the decision of the Fifth Circuit to stand under these circumstances would either engraft an exception into § 33(f) and (g) never contemplated by the statute with regard to possible improvident settlements, and/or would totally thwart the *quid pro quo* given to employers under § 33 in exchange for their strict liability to pay compensation irrespective of fault. 33 U.S.C. § 904(b) (1986).

## II. THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS DOES NOT HAVE STANDING TO RESPOND IN THE COURTS OF APPEALS IN OPPOSITION TO A PRIVATE PARTY WITH RESPECT TO A RULING IN WHICH HE HAS NO INTEREST.

The Director of the Office of Workers' Compensation Programs does not have standing to respond in opposition to an employer's appeal with respect to a ruling in

which he has no interest. Both the framework and the history of the LHWCA evidence a statutory intent to remove the Director from any litigative posture. Under the 1972 amendments to the LHWCA, the Director is limited to an impartial administrative role to encourage the informal resolution of conflicts between employers and employees. The LHWCA does not allow the Director to appeal a case to the U. S. Courts of Appeals unless the Director is adversely affected or aggrieved. Since the U. S. Constitution's Article III standing requirements are the same for any party litigant, the Director must be able to show that he would be adversely affected or aggrieved by the case in order to participate as a respondent before the courts of appeals. In accord with a long line of case law from the Fourth Circuit, the Director is not to be accorded automatic standing to participate in LHWCA cases before the courts of appeals which involve private disputes between an employee and an employer.

The Fifth Circuit has held in the present case that the Director had standing under Rule 15(a) of the Federal Rules of Appellate Procedure to respond to all appeals under the LHWCA. Although Rule 15(a) does state that in the review of orders of an administrative agency the agency be named respondent, the D.C. Circuit and Fourth Circuit have held that the general applicability of Rule 15(a) is not appropriate in LHWCA claims because the involvement of the Director is not necessary to insure the proper adversarial clash necessary to a "case or controversy." Moreover, the terms of the LHWCA require that the Director be adversely affected or aggrieved, the same as any other party, before it may participate in review before the courts of appeals.

The LHWCA is devoid of any role for the Director in cases before the courts of appeals absent some direct interest. If the Director were to have a role, the statute easily could have so provided. Although certain regulations of the Director are subject to differing interpretations, they may not be interpreted to exceed the authority granted by the LHWCA. Moreover, even if Rule 15(a) requires that the Director be named as a nominal respondent, it is a procedural rule only and should not confer standing to nor give the Director the automatic right to take sides in a private dispute between an employee and employer who are both represented by counsel.

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#### ARGUMENT

#### **I. A WIFE WHO SETTLES HER CLAIMS FOR THE WRONGFUL DEATH OF HER HUSBAND WITHOUT THE CONSENT OF HIS EMPLOYER IS BARRED BY SECTION 33(g)(1) OF THE LHWCA FROM RECEIVING COMPENSATION BENEFITS FROM THE EMPLOYER REGARDLESS OF WHETHER THE UNAPPROVED SETTLEMENTS OCCURRED BEFORE OR AFTER THE HUSBAND'S DEATH.**

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, is a workers' compensation scheme enacted in 1927 and is applicable to shipyard workers such as the late Jefferson Yates. 33 U.S.C. §§ 902(3), 903(1) (1986). The LHWCA, like all workers' compensation schemes, reflects a compromise between the rights of employees and employers. The employees give up unlimited damages at common law for



prompt payment of statutory benefits. *Peters v. North River Ins. Co.*, 764 F.2d 306, 310 (5th Cir. 1985); *Louviere v. Shell Oil Co.*, 509 F.2d 278, 283 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976). To recover benefits, the injured worker need not show that the employer was at fault in causing the injury. 33 U.S.C. § 904(b) (1986). Instead, the employee need only show that his injury arose out of and in the course of employment. 33 U.S.C. § 902(2) (1986). Where an injured worker establishes that he has suffered a compensable injury, he may be entitled to compensation and/or medical benefits under the LHWCA. 33 U.S.C. §§ 907, 908 (1986). If the worker's injury results in his death, the worker's spouse and dependents are likewise entitled to compensation under the LHWCA. 33 U.S.C. § 909 (1986).

Section 33 of the LHWCA allows either the employee or the employer to seek recoveries against a responsible third party. 33 U.S.C. § 933(b) (1986). Its purpose is to (1) place the burden ultimately on the person or entity whose fault caused the injury; and (2) to protect employers who are liable to its employees under the LHWCA regardless of fault. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953); *see Peters*, 764 F.2d at 310. Where the employee recovers on a third party claim, his employer is entitled to reimbursement from the net third party recovery (gross recovery less attorney fees and expenses) for all benefits paid under the LHWCA. At the same time the employer's LHWCA subrogation rights against the tortfeasor are extinguished. 33 U.S.C. § 933(f) (1986); *see Peters*, 764 F.2d at 317-321.

To protect an employer "against his employee accepting too little for his cause of action against a third party" and thereby subjecting the employer to excessive compensation liability to the employee, the LHWCA also includes a forfeiture provision at § 33(g) of the LHWCA. *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, 467 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971). Section 33(g)(1) provides that where the "person entitled to compensation" settles with a third person without the approval of the employer or carrier for less than he would be entitled under the LHWCA, then any claim he may have for further compensation and medical benefits is barred. In 1984, § 33(g)(1) of the LHWCA was amended to provide that forfeiture occurs "regardless of whether the employer or employer's insurer has made payments or acknowledged entitlement to benefits under this chapter."<sup>5</sup>

Mr. Yates developed an asbestos-related disease during his employment. He filed a claim for compensation against Ingalls under the LHWCA. He also filed a products liability action against many asbestos manufacturers claiming that he was exposed to and injured by their products while working for Ingalls.

Mr. and Mrs. Yates subsequently entered into eight third party settlements without the consent of Ingalls. In six of them, Mrs. Yates released all claims she had for the

<sup>5</sup> The amended version of § 33(g) applies to this case, which was pending on or after the date of enactment of the 1984 amendments. *See* § 28(a) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-428, 98 Stat. 1639, 1655 (1984).

potential wrongful death of her husband for amounts which were less than the compensation to which she would be entitled from Ingalls. By entering into these unapproved third party settlements, Mrs. Yates exposed Ingalls to compensation liability to her and, at the same time, extinguished Ingalls' LHWCA subrogation rights against the asbestos manufacturers. *See, e.g., Peters*, 764 F.2d at 312. Notwithstanding the prejudicial effect of these unapproved settlements on Ingalls, the Fifth Circuit held that Mrs. Yates was not a "person entitled to compensation" under § 33(g) because her husband was alive when she entered into the settlements, and therefore, she was not obligated to comply with the employer approval requirements of § 33(g)(1) with respect to those settlements. (Pet. Writ Cert. App. 10-11).

The Fifth Circuit erred in finding § 33(g)(1) inapplicable to a wife who settles her wrongful death claims before the death of her husband. The prejudicial effect on her husband's employer is the same regardless of whether the settlements occur before or after the husband's death. Further, such a decision in effect confers greater protection under the law to a potential widow than to an actual widow or to her husband, the injured worker, from whom all benefits are ultimately derived.<sup>6</sup> In this regard, the Fifth Circuit's decision neither considered the underlying purpose nor the plain language of § 33(g)(1).

<sup>6</sup> Had Mrs. Yates been a widow receiving compensation from Ingalls at the time she settled with third parties without Ingalls' consent, or had her husband done the same during his lifetime (which he did), his right to receive future compensation would clearly be barred. *See Cowart*, 505 U.S. at 471 & 475 (1992).

The beginning point here must be § 33(g)(1) itself. When a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary of circumstances, is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (citing *Demarest v. Manspeaker*, 498 U.S. 189, 190 (1991)); *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 275 (1980).

Section 33(g)(1) provides as follows:

If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) *would be* entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. § 933(g) (1986) (emphasis added); (Pet. Writ Cert. App. pp. 89-90).

By making itself applicable to what a person or person's representative "would be" entitled under the LHWCA, § 33(g)(1), the statutory scheme encompasses a broad forward looking concept which equally would apply to a person who would be entitled to compensation



in the future. Applying a forward looking interpretation to the LHWCA is not a novel idea. In *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), the Fifth Circuit held that § 8(h) of the LHWCA regarding assignment of disability requires a "forward-looking" perspective. *Id.* at 772. Similarly, the LHWCA, in a forward-looking approach, allows posthumous children to recover death benefits. 33 U.S.C. § 902(14) (1986). Likewise, awards of death benefits and permanent total disability benefits are subject to future inflationary adjustments. 33 U.S.C. § 906(b)(1) (1986).

The "would be" language of § 33(g)(1) has been relied upon by the Benefits Review Board when considering whether a settlement is for more than or less than the benefits to which an injured worker would be entitled under the LHWCA. *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). Specifically, in *Linton*, the Board held that one should look not only to an injured worker's present entitlement but to his future entitlement to determine whether the third party recovery is for more than the employer's liability under the LHWCA. *Id.*

A prospective construction of § 33(f) and (g) was given by the Ninth Circuit in a case identical to the case at bar. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994); (Pet. Writ Cert. App. 91-100). In *Cretan*, an injured shipyard worker and his wife entered into third party settlements before his asbestos-related death. *Cretan*, 1 F.3d at 845. Those settlements, like the settlements in the present case, included the potential wrongful death claims of Mrs. Cretan. *Id.* Like Mr. and Mrs. Yates in the present case, Mr. and Mrs. Cretan did not obtain the employer's written consent to

the settlements. *Id.* The Ninth Circuit held that the LHWCA claim of Mrs. Cretan, which she filed following the death of her husband, was barred by the plain language of § 33(g)(1) due to her unapproved pre-death settlements. *Id.* at 848. In so concluding, the Ninth Circuit re-adopted its earlier view that "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment." *Id.* at 846 (citing *Force v. Director, OWCP*, 938 F.2d 981, 984-985 (9th Cir. 1991)). Indeed, the Ninth Circuit concluded that, in determining the applicability of § 33(g)(1), there was "little sense in a distinction that turns on whether the death for which settlement is made has yet to occur" because the prejudicial effect on the employer is the same. *Cretan*, 1 F.3d at 847.

In ascertaining the plain meaning of the statute, the court must look not only to the particular statutory language, but also to the "design of the statute as a whole and to its object and policy". *Crandon v. United States*, 494 U.S. 152, 158 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *County of Seneca v. Cheney*, 806 F. Supp. 387, 404 (W.D.N.Y. 1992). The language of § 33(f) and (g) are designed to form a comprehensive scheme to protect an employer from payment of increased compensation to a worker who accepts too little for his third party claims. *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968); *I.T.O. Corp. v. Selman*, 954 F.2d 239, 242 (4th Cir. 1992). Clearly, the underlying purpose of § 33(g) would be eliminated by allowing a wife to enter into unapproved settlements of her wrongful death claims for less than she would be entitled under the LHWCA and then allow her

to recover LHWCA benefits against the employer following her husband's death as if she had never settled these claims.

In *Cretan*, the Ninth Circuit noted that if it adopted such a view, "third party tortfeasors could benefit from offering to desperate families inordinately small [pre-death] settlements the deficiencies of which the employer would have to make up [following the worker's death]." *Cretan*, 1 F.3d at 848. Put another way, such a view would allow relatives of claimants who are destined to die from an occupational disease the opportunity to negotiate pre-death settlements, benefit from a double recovery against the employer under the LHWCA and, at the same time, defeat the employer's rights of offset under § 33(f) because they were not "persons entitled to compensation" at the time of the unapproved settlements. Such results make no sense when the purpose and structure of § 33(f) and (g) are considered. See *Cowart*, 505 U.S. at 482.

The Fifth Circuit apparently felt compelled to find as it did because of the "vesting" language in *Cowart*. This Court found in *Cowart* that an employee became a person entitled to compensation at the time of his injury rather than when an employer admits liability. *Cowart*, 505 U.S. at 477. In so finding, this Court noted that *Cowart* became a person entitled to compensation "at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.*; (Pet. Writ Cert. App. p. 109). Seizing upon this language, the Fifth Circuit concluded that Mrs. Yates was not bound by the employer approval requirements of § 33(g)(1) because at the time of the pre-death settlements, her claim for LHWCA death benefits against Ingalls had not vested.

*Cowart* did not deal with whether a wife can enter into unapproved wrongful death settlements and then seek LHWCA compensation benefits once her husband dies. In finding that *Cowart* did not control this issue, the Ninth Circuit stated in *Cretan v. Bethlehem Steel Corp.*, as follows:

It is clear that the holding of *Cowart* does not dictate the outcome of our case. It does not rule on the question whether a claimant whose entitlement will mature upon a death that has not yet occurred is a "person entitled to compensation." *Cowart* does, however, contain language that in isolation appears to support the *Cretans*. In rejecting the view that *Cowart* did not become "entitled" until he obtained an order or a payment, the Court stated: "He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id.* at \_\_\_, 112 S.Ct. at 2595. The Court also stated that the normal meaning of entitlement is that "the person satisfies the prerequisites attached to the right." *Id.* The *Cretans* seize upon this language, and argue that their entitlement to compensation under the Act vested when John died. There is no reason, however, to assume that the Supreme Court had the present situation in mind when it uttered these dicta. The Court's point was that an entitlement did not have to be reduced to order or payment to be an entitlement. The *Cretans* give the vesting language a reading which is separated from the facts to which it is addressed. We decline to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended. See *United States v. Ordonez*, 737 F.2d



793, 803 n.1 (9th Cir. 1984) (discussing uses of dictum).

*Cretan*, 1 F.3d at 847.

In *Cowart*, this Court found that the natural reading of § 33(g) supported the conclusion that a "person entitled to compensation" within the meaning of § 33(g)(1) need not at the time of the unapproved settlements be receiving compensation or have had an adjudication in the person's favor. *Cowart*, 505 U.S. at 477. This is entirely consistent with the position of Ingalls that the natural reading of § 33(f) and (g) support the conclusion that a "person entitled to compensation" is not only one who is receiving compensation but is also one who "would be" entitled to receive compensation in the future. To view § 33(f) and (g) any other way would allow a wife to settle her wrongful death claims the day before her husband's death and still be entitled to LHWCA death benefits without offset while another wife who settles the day after her husband's death is completely barred from such benefits by § 33(g)(1). Certainly, such an illogical result surely strains the intent of the statute.

In addition, since a widow's claim for compensation benefits is derivative of the initial injury, the vesting language in *Cowart* is entirely compatible with the LHWCA interplay between a lifetime disability claim and a post-death survivor's claim arising out of the same injury. In this regard, the Fourth Circuit has noted as follows:

The Act does provide, as the carrier urges, for two separate rights and types of recovery, the beneficiaries of which are different. One

embraces the compensation payable to the disabled employee by way of disability benefits; the other represents death benefits payable to certain statutorily designated beneficiaries. But both types of recovery derive their basis from the same event, i.e., the employee's injury. It is that event which gives both a right to compensation under Section 908 and a right to death benefits under Section 909. Neither right of action, whether for compensation payments or for death benefits, exists apart from the critical fact of injury; each is dependent for its basis on the injury. It is inaccurate, therefore, to state that the right to death benefits has its origin solely in the event of death; the real source of liability for such payments under the Act traces back to the injury itself.

*Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Spence*, 591 F.2d 985, 987 (4th Cir.), cert. denied, 444 U.S. 963 (1979) (emphasis added); see also *Todd Shipyards Corp. v. Witt-huhn*, 596 F.2d 899, 901 (9th Cir. 1979).

The critical aspects of a potential death claim vest at the time of the worker's injury. The LHWCA provides that "[a]ll questions of dependency shall be determined as of the time of the injury." 33 U.S.C. § 909(f) (1986). Since Mrs. Yates' status as a dependent widow was established as of the time of her husband's injury, her § 33(g) approval obligations were also established at the time of his injury.

Many other aspects of a death claim also vest at the time of the worker's injury. For example, the responsible insurance carrier is determined at the time of injury as opposed to the time of death. *Travelers Ins. Co. v. Marshall*,

634 F.2d 843, 847 (5th Cir. 1981). The jurisdictional requirement of situs for a death claim is determined at the time of injury. 33 U.S.C. § 903(a) (1986). The jurisdictional requirement for status in a death claim is likewise determined based upon a worker's status at the time of injury. 33 U.S.C. § 902(3) (1986). The responsible employer in an occupational disease claim is the last employer where the worker was exposed to injurious stimuli before his death. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144 (2nd Cir.), *cert. denied*, 350 U.S. 913 (1955). The average weekly wage which is used as a basis for paying a widow compensation is based upon the decedent's average weekly wage at the time of injury. 33 U.S.C. § 910 (1986).

Despite the fact that critical aspects of a death claim vest at the time of injury, the Fifth Circuit in *Cowart* found that Mrs. Yates was free to ignore § 33(g) because Mr. Yates was alive when she settled her third party potential wrongful death claims. Such a finding creates a patent asymmetry in the law. How can a potential widow enter into enforceable settlements of her potential wrongful death claim to the prejudice of the employer and at the same time not have a concomitant obligation to abide by the approval requirements of § 33(g)(1)? To the extent entitlement existed, Mrs. Yates was just as entitled to receive compensation under the LHWCA as she was entitled to recover for her husband's wrongful death when she entered into the unapproved settlements during his lifetime. By obtaining the functional equivalent of LHWCA benefits through the third party settlements in return for settling her future wrongful death claims, Mrs. Yates gained the benefits her status as a potential widow

conferred. By occupying the status of a widow in order to settle and be paid for her future wrongful death claims, and because she became vested with the LHWCA's protections and benefits once her husband was injured at work, she was a "person entitled to compensation" who settled with third parties for an amount less than the compensation to which she "would be entitled" under § 33(g)(1). Accordingly, she should not be permitted to avoid her § 33(g)(1) employer approval responsibilities and obtain greater benefits and protections than that afforded to covered employees who settle their third party claims, and to widows who settle post-death third party claims. *See generally Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992).<sup>7</sup>

Moreover, the Fifth Circuit's narrow interpretation of the phrase "person entitled to compensation" in § 33(g), if equally applied to the same phrase in § 33(f), would preclude the right of Ingalls to a statutory offset or credit with respect to the net amounts recovered by Mrs. Yates from the third party settlements. Section 33(f) provides in pertinent part as follows:

If the person entitled to compensation institutes proceedings . . . the employer shall be required

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<sup>7</sup> In reaching their decision that the widow's claim was not vested prior to decedent's death, the Fifth Circuit noted that certain contingencies could have prevented Mrs. Yates from ever being entitled to LHWCA benefits. For example, the Court noted that Mrs. Yates could have predeceased or divorced her husband, or Mr. Yates could have died from unrelated causes. (Pet. Writ Cert. App. 10-11). However, those same contingencies would have likewise prevented Mrs. Yates from ever recovering tort damages for the wrongful death of her husband.



to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person.

33 U.S.C. § 933(f) (1986) (emphasis added).

It is a basic canon of statutory construction that identical terms within an act bear the same meaning. *Cowart*, 505 U.S. at 479; *Sullivan v. Strop*, 496 U.S. 478, 484 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986). In *Cowart*, this Court rejected a narrow interpretation of "person entitled to compensation" in § 33(g) in large part because it made no sense when applied to § 33(f). *Cowart*, 505 U.S. at 478-479. In that regard, this Court in *Cowart* stated as follows:

Another difficulty would be presented for the provision preceding § 33(g), § 33(f). It mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from a third party. Under *Cowart*'s reading, the reduction would not be available to employers who had not yet begun payment at the time of the third party recovery. That result makes no sense under the LHWCA structure. Indeed, when a litigant before the BRB made this argument, the Board rejected it, acknowledging in so doing that it had adopted differing interpretations of the identical language in sections 33(f) and 33(g). *Force v. Kaiser Aluminum and Chemical Corp.*, 23 BRBS 1, 4-5 (1989). This result is contrary to the basic canon of statutory construction that identical terms within an Act bear the same meaning. *Sullivan v. Strop*, 496 U.S. 478, 484, 110 L Ed 2d 438, 110 S Ct 2499

(1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860, 89 L Ed 2d 855, 106 S Ct 1600 (1986). The Board's willingness to adopt such a forced and unconventional approach does not convince us we should do the same. And we owe no deference to the BRB.

*Cowart*, 505 U.S. at 479.

Likewise, in *Cretan*, the Ninth Circuit observed that the same interpretation given to the phrase "person entitled to compensation" in § 33(g) would have to be given to the same phrase in § 33(f). *Cretan*, 1 F.3d at 848. The *Cretan* court correctly found that a narrow interpretation of the phrase "person entitled to compensation" would defeat not only the purpose of § 33(g) but also the purpose of § 33(f), which is to protect employers against double recovery when a worker or those claiming through him enter into unapproved third party settlements. *Id.* at 847.

In construing the phrase "person entitled to compensation" in § 33(f), the Ninth Circuit held in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991), as follows:

We reject Mrs. Force's argument that section 933(f) does not provide for any offset against her death benefits. She contends that section 933(f) does not apply to her because she was not a "person entitled to compensation" at the time she entered into the settlement, which was prior to her husband's death. Again, we defer to the Director's view that section 933(f) does not require the claimant's status as a "person entitled to compensation" to be determined at any particular time; "[t]he only relevant question is

whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur." Director's Brief at 26. If Mrs. Force had successfully sued for wrongful death after her husband's death, Kaiser clearly would be entitled to offset the damages recovered against its death benefits liability. Instead, she settled her *potential* wrongful death claims prior to Mr. Force's death. Section 933(f) is equally applicable and allows the employer to offset the third party recovery.

*Force*, 938 F.2d at 984-985.

To find, as the Fifth Circuit did, that persons "entitled to compensation" are only those "vested" with rights to currently receive biweekly compensation benefits would be to misread § 33(f) and (g), and to ignore the purpose for adding these sections in the LHWCA, and would in effect create an unlimited potential for manipulation of the compensation system to the detriment of all LHWCA employers. For example, if an employee is injured at work but does not initially miss work due to the injury, he may not be entitled to *receive* compensation. It could hardly be argued, however, that if that employee pursues a third party action for tort benefits due to the injury, he is not "a person *entitled* to compensation" under § 33(g). 33 U.S.C. § 933(g) (1986) (emphasis added). The employee's entitlement to compensation, per *Cowart*, accrues when he was injured, regardless of whether the employer has paid or recognized the employee's entitlement to compensation. Likewise, where an employee is injured at work in such a way that the injury may lead to the employee's death, the fact that the spouse of the employee is not yet receiving compensation while the

employee is alive does not mean that she loses her status as a "person *entitled* to compensation." 33 U.S.C. § 933(g) (1986) (emphasis added). Surely, such a spouse seeking compensation benefits under the LHWCA should not be granted any greater rights under § 33(g) than the injured and deceased employee would have had, had he lived and consummated unapproved third party settlements. Under the narrow interpretation of a "person entitled to compensation" given by the Fifth Circuit, the employer would have absolutely no rights under § 33(f) and (g) with respect to such settlements. Such an illogical interpretation is a matter of great potential consequence.

The better view, and the one which comports with LHWCA's intent, and is logical and that avoids absurd results, is that a person's rights under the LHWCA to all forms of compensation benefits, including biweekly compensation payments and medical benefits, and the rights under the LHWCA to those who claim through the injured employee, are vested in such persons when a covered job-related injury occurs. It is the occurrence of this injury, whether disabling or not, which initiates coverage under and vesting in the rights and benefits the LHWCA confers. Though the right to be in receipt of certain benefits at certain times is contingent with all covered persons (employees, children, and surviving spouse) on the occurrence of certain events, those persons are nonetheless covered, *i.e.*, vested with coverage, under the LHWCA at the time of injury, subject, of course, to any defenses the employer/carrier may have.

Rather than give a very narrow interpretation to § 33(g), as the Fifth Circuit did, Congress expanded the scope of the employer approval requirements of § 33(g)



by the 1984 amendments. Those amendments expressed a clear intent that § 33(g) apply, without exception, to all claimants or potential claimants who settle third party claims for less than the compensation to which they "would be entitled." The LHWCA has recognized in § 33(f) and (g) that the employer's subrogation and offset rights with respect to future compensation liabilities are as important as they are with respect to compensation liabilities already incurred.

Further, this Court in *Cowart* referred to the employer's status as a "real party in interest with respect to any settlement that *might* reduce but not extinguish the employer's liability." *Cowart*, 505 U.S. at 482 (emphasis added). *Cowart's* interpretation dovetails with the purpose for § 33(f) and (g), which exist to protect employers in the face of payments they must make to covered persons without regard to fault. 33 U.S.C. § 904(b) (1986). This, in the context of the natural interpretation which should be given to the structure and purpose of § 33(g)(1), lead inalterably to the conclusion that Ingalls was a real party in interest to the pre-death settlements of Mrs. Yates. She and her attorneys chose to consummate those settlements without the consent of Ingalls. Accordingly, the direct and unmistakable language of § 33(g)(1) protects Ingalls from any further liability and compels the reversal of the Fifth Circuit in this case.

## II. THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS DOES NOT HAVE STANDING TO RESPOND IN THE COURTS OF APPEALS IN OPPOSITION TO A PRIVATE PARTY WITH RESPECT TO A RULING IN WHICH HE HAS NO INTEREST.

Notwithstanding the lack of a financial stake in this matter, the fact that claimant is represented by able counsel, and the fact that no administrative duties or functions of the Director will be affected by the outcome of this case, the Director has interjected himself into this appeal in active opposition to Ingalls. This is a workers' compensation claim which involves "private rights" under the LHWCA. *Kalaris v. Donovan*, 697 F.2d 376, 389-397 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983); *see Crowell v. Benson*, 285 U.S. 22 (1932). As such, for the Director to actively oppose an employer in a case which does not affect his administrative duties is contrary to the entire framework of the LHWCA.

Congress authorized the Secretary of Labor ("the Secretary") to administer the LHWCA and to promulgate the regulations necessary to carry out that delegation of authority, in much the same way any agency is empowered to administer the programs entrusted to it. *See* 33 U.S.C. § 939(a) (1986). The Secretary of Labor has, in turn, delegated his administrative duties under the LHWCA to the Director, Office of Workers' Compensation Programs. 20 C.F.R. § 701.201-.203 (1989). The Director's duties under the LHWCA are primarily ministerial. For example, the general responsibilities of the Director under the LHWCA are as follows:

(1) supervising, administering, and making rules and regulations for calculation of benefits and processing of claims, 33 U.S.C. §§ 906, 908-10, 914, 919, 930, and 939 (2) supervising, administering, and making rules and regulations for provision of medical care to covered workers, § 907; (3) assisting claimants with processing claims and receiving medical and vocational rehabilitation, § 939(c); and (4) enforcing compensation orders and administering payments to and disbursements from the special fund established by the Act for the payment of certain benefits, §§ 921(d) and 944.

*Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1285 (1995).

One of the specific functions of the Director is to encourage the informal resolution of conflicts between employers and employees. 20 C.F.R. § 702.311 (1989). The Director is also charged with providing "information and assistance" to all persons covered by the LHWCA, including employers. 33 U.S.C. §§ 902(1), 939(c) (1986). As such, this Court in *Newport News* pointed out that "[t]he Director is not the designated champion of employees within this statutory scheme. To the contrary, one of her principal roles is to serve as the broker of informal settlements between employers and employees." *Newport News*, 115 S.Ct. at 1286.

Where the parties cannot informally resolve their differences, the case must be referred to an independent "hearing examiner," upon the request of either party.<sup>8</sup> 33 U.S.C. § 919(d) (1986); *Ingalls Shipbuilding, Inc. v.*

<sup>8</sup> The hearing examiners are known as administrative law judges. 29 C.F.R. § 18.2(b).

*Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994); 20 C.F.R. § 702.301 (1989). The administrative law judge conducts the hearing and decides the case in accordance with the Administrative Procedures Act, 5 U.S.C. § 554 *et seq.* (33 U.S.C. § 919(d) (1986); 20 C.F.R. § 702.332 (1989)). A regulation enacted by the Director, not the statute, gives him the right to appear and participate before the administrative law judge. 20 C.F.R. § 702.333(b) (1989).

Following the hearing, the administrative law judge must enter an order making an award or rejecting the claim. 33 U.S.C. § 919(c) (1986). Thereafter, any "party in interest" has a right to appeal the decision to the Benefits Review Board. 33 U.S.C. § 921(b)(3) (1986); 20 C.F.R. §§ 702.391, 801.102 (1989). Again, a regulation of the Director, not the statute, allows him to appeal a case to the Benefits Review Board. 20 C.F.R. § 801.2(10) (1989). The Benefits Review Board is another administrative entity whose members are appointed by the Secretary of Labor. 33 U.S.C. § 921(b)(1) (1986).<sup>9</sup> The Board is organizationally located within the office of a Deputy Secretary of Labor (20 C.F.R. § 801.103 (1989)), and its members serve at the pleasure of the Secretary of Labor. 20 C.F.R. § 801.201 (1989). The Secretary may even remove a board member without cause. *Kalaris*, 697 F.2d at 381.

A decision of the Benefits Review Board may be appealed to a U.S. Court of Appeals for the appropriate

<sup>9</sup> The Benefits Review Board, acting as a "quasi-judicial" internal review mechanism, considers the record developed before the ALJs, administers department policy and renders decisions. 33 U.S.C. § 921(b)(3) (1986); *see* 20 C.F.R. § 802.301 (1989).



circuit. 33 U.S.C. § 921(c) (1986). The statute reads as follows:

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.

33 U.S.C. § 921(c) (1986).

Only a "person adversely affected or aggrieved" by the decision may appeal a case to the court of appeals. *Id.* (emphasis added). The statutory term "person" is specifically limited in the LHWCA to an "individual, partnership, corporation, or association." 33 U.S.C. § 902(1) (1986). The statutory term "person" excludes the Secretary and the Director from becoming persons "adversely affected or aggrieved" for purposes of § 21(c) appellate review. The LHWCA does not by its terms make the Secretary or the Director a party to the proceedings or grant either one the authority to prosecute appeals to the courts of appeals.<sup>10</sup>

In *Newport News*, this Court held that where the decision of a court of appeals does not frustrate the administrative duties or functions of the Director, the Director is not "adversely affected or aggrieved" and therefore has no standing to appeal to the courts of appeals. *Newport News*, 115 S. Ct. at 1286-1287.

<sup>10</sup> However, by another regulation, the Director seems to give himself that authority. 20 C.F.R. § 802.410(b) (1989).

The Director's only position and reason for appearing as a respondent in this case is that he does not agree with Ingalls. In *Newport News*, this Court found that, even construing the LHWCA "as liberally as can be," the Director was not "adversely affected or aggrieved" within the meaning of § 921(c) in a case such as this. *Id.* at 1288. For all practical purposes, whether the Director has standing to appeal or whether the Director has standing to actively interject himself into an appeal to the courts of appeals is not a distinction of importance because there is no statutory authority for him to do either one.

In *Newport News*, this Court also held that the structure of the LHWCA itself suggests that the Director's role is supposed to be "facilitative - a service to both parties rather than an imposition on either of them." *Id.* at 1287. Thus, this statutory structure is obviously why the LHWCA does not empower the Director to participate in the courts of appeals on behalf of either party in a case involving private compensation rights.

The Fourth Circuit has consistently held that where the Director is not "adversely affected or aggrieved," he does not have automatic standing to participate either as an appellant or as a respondent in a case before it. *Parker v. Director, OWCP*, 75 F.3d 929, 935 (4th Cir. 1996); *I.T.O. Corp. v. Pettus*, 73 F.3d 523, 526 n.1 (4th Cir. 1996); *I.T.O. Corp. v. Benefits Review Board*, 542 F.2d 903, 909 (4th Cir. 1976) (en banc), *vacated sub nom.*, *Adkins v. I.T.O. Corp.*, 433 U.S. 904 (1977), *reaff'd*, *I.T.O. Corp. v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977) (en banc).<sup>11</sup>

<sup>11</sup> In *I.T.O. Corp. v. Benefits Review Board*, the Fourth Circuit held that "to be a party [respondent] before this court, the

Notwithstanding the fact that the Director was not adversely affected or aggrieved by the decision of the Benefits Review Board in this case, the Director asserted entitlement to automatic standing as a respondent before the Fifth Circuit. Ingalls objected to the involvement of the Director and its objection was carried with the case. The Director actively opposed Ingalls in the Fifth Circuit.<sup>12</sup>

In its ruling on the merits, the Fifth Circuit found a different ground for granting standing to the Director. Citing *Ingalls Shipbuilding, Inc. v. White*, 681 F.2d 275 (5th Cir. 1982), *rev'd on other grounds, Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406-407 (5th Cir.) (en banc), *cert denied*, 469 U.S. 818 (1984), the Fifth Circuit held that the Director had standing to actively oppose Ingalls' appeal based upon Rule 15(a) of the Federal Rules of Appellate Procedure. Rule 15(a) states in pertinent part as follows:

The petition must name each party seeking review . . . [and] also must designate the respondent and the order or part thereof to be reviewed. In each case the agency must be named respondent.<sup>13</sup>

Fed. R. App. P. 15(a)

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Director must have some concrete stake in the outcome of the case." 542 F.2d at 907; (see *Pet. Writ Cert. App.* at pp. 181-197).

<sup>12</sup> Counsel for the Solicitor submitted briefs and participated in oral argument against Ingalls in the Fifth Circuit.

<sup>13</sup> Rule 15(a) defines the term "agency" as including agency, board, commission, or officer. Fed. R. App. P. 15(a).

In relying upon Rule 15(a), the Fifth Circuit in *White*, noted as follows:

Rule 15(a) is generally applicable to statutory review proceedings within this Court's original jurisdiction. This Court has such jurisdiction under § 921(c). Prior to 1972, § 921(c) identified the "deputy commissioner making the order" as a respondent. The amended version of § 921(c) is silent as to who shall appear as a respondent for the agency, but the Secretary has filled that gap by promulgating 20 CFR § 802.410(b), which names the Director to represent the Department of Labor in review proceedings. Thus, it appears that the rule requires Ingalls to name the Director as respondent in its petition.

*White*, 681 F.2d at 282-283.

The general applicability of Rule 15(a) simply is not appropriate in the context of an LHWCA case because the Director's presence as a party is not necessary. In explaining why the Director should not be a respondent under Rule 15(a), the District of Columbia Circuit noted as follows:

Normally, a single private party is contesting the action of an agency, which agency must appear and defend on the merits to insure the proper adversarial clash requisite to a "case or controversy." But Rule 1(b), Fed.R.App.P., says that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." Here, there is sufficient adversity between [the employer and the claimant] to insure proper litigation without participation by the Board. To require the Board to appear as a party would parallel requiring the



District Court to appear and defend its decision upon direct appeal.

*McCord v. Benefits Review Board*, 514 F.2d 198, 200 (D.C. Cir. 1975).

The ruling in *McCord* was expanded in *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982), to apply to the Director, OWCP. Specifically, the D.C. Circuit noted in *Shahady* as follows:

The Director argues that if the Board is not a proper federal respondent, then the DOWCP must be. We disagree. The reasoning of *McCord* – that the rationale of Rule 15(a) is inapplicable to this kind of situation – applies as much to the DOWCP as it does to the Board.

*Shahady*, 673 F.2d at 485.

The rationale of the D.C. Circuit that Rule 15(a) is not applicable in the context of an LHWCA petition for review has also recently been adopted by the Fourth Circuit in *Parker v. Director, OWCP*, 75 F.3d 929 (4th Cir. 1996). In *Parker*, the Fourth Circuit held that the Director may not automatically be named as a respondent in the appeal of an LHWCA case without a showing that he is adversely affected or aggrieved within the meaning of § 21(c). *Parker*, 75 F.3d at 935.

Before the 1972 amendments to the LHWCA, Pub. L. No. 92-576, 86 Stat. 1251, deputy commissioners designated by the Secretary of Labor not only administered the claims but they also decided them. In order to appeal the decision of the deputy commissioner, the employee or employer was required to seek an injunction in the appropriate United States District Court against the deputy

commissioner. 33 U.S.C. § 921(b) (1927), amended by 33 U.S.C. § 921(b) (1986). Since the deputy commissioner was the defendant in the federal action, former § 21(a) of the LHWCA necessarily required that the deputy commissioner be named a respondent. See 33 U.S.C. § 921(a) (1928), amended by 33 U.S.C. § 921(a) (1986). In considering the 1972 amendments, fault was found with this scheme in which the deputy commissioners were both administrators and adjudicators. Thus, the amendments separated the two functions and provided that the designee of the Secretary of Labor (the Director) would be responsible for the administrative or clerical functions and the administrative law judges and the Benefits Review Board would be responsible for the adjudicative functions. The Senate Report to the 1972 Amendments complained that the old version of the LHWCA had:

[s]uffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings. . . .

H.R. Rep. No. 1125, 92nd Congress, 2d Sess. 13-14 (1972).

Thus, even though the pre-1972 LHWCA necessarily required that the representative of the Secretary be designated as a defendant or respondent, the very purpose of the 1972 Amendments was to remove the Director from the adjudicative process. Accordingly, the present silence of the LHWCA as to any role of the Director before the courts of appeals must have been intentional and he should have no right to interject himself into compensation claims involving private rights. This is because the Director, as the administrator of claims, should be neutral. Nowhere in the LHWCA is the Director permitted to take sides.

In *Newport News*, this Court specifically addressed the silence of the post-1972 Amendments with respect to the standing of the Director to participate in appeals involving private compensation rights. In holding that this silence is intentional, this Court noted as follows when comparing the LHWCA to the Black Lung Act<sup>14</sup>:

The Director argues that since the Secretary is explicitly made a party under the BLBA, she must be meant to be a party under the LHWCA as well. That is not a form of reasoning we are familiar with. The normal conclusion one would derive from putting these statutes side by side is this: when, in a legislative scheme of this sort, Congress wants the Secretary to have standing, it says so.

*Newport News*, 115 S. Ct. at 1288.

Rule 1(b) of the Federal Rules of Appellate Procedure states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the court of appeals as established by law." Since the LHWCA does not extend to the Director the authority to participate in appeals in which he is not adversely affected or aggrieved, Rule 1(b) precludes his active participation in this case.

---

<sup>14</sup> The Black Lung Act includes specific statutory standing for the Director before the courts of appeals. The LHWCA does not.

## CONCLUSION

Under 33 U.S.C. § 933(g)(1), Ingalls has the inviolate right, the same as all LHWCA employers, to approve third party settlements by a worker or those claiming through him which are for less than the compensation to which they would be entitled. As such, the rights of Ingalls which § 33(g)(1) was meant to protect were violated when Mrs. Yates entered into third party settlements during the lifetime of her husband for less than the compensation to which she would be entitled due to his work-related injury and death. Under these circumstances, the direct and unmistakable language of § 33(g)(1) requires, without exception, that Ingalls should have no further liability to Mrs. Yates in this case. Accordingly, the Fifth Circuit ruling should be reversed.

The Fifth Circuit's ruling allowing standing to the Director as a respondent should also be reversed. The LHWCA gives the Director no standing, either as an appellant or as a respondent, to actively participate in a workers' compensation claim involving private rights between an employee and his employer. The statutory term "person" excludes the Secretary of Labor and the Director from becoming persons "adversely affected or aggrieved" for purposes of § 21(c) review of such cases by the courts of appeals. 33 U.S.C. §§ 902(1), 921(c) (1986). Accordingly, the courts of appeals are precluded by Rule 1(b) of the Federal Rules of Appellate Procedure from extending their jurisdiction to permit active participation by the Director because he has not been given that right



by the LHWCA itself. Therefore, the contrary ruling of the Fifth Circuit should be reversed.

Respectfully submitted,

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American Mutual Liability  
Insurance Company, In  
Liquidation, by and through the  
Mississippi Insurance Guaranty  
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Dated: June, 1996

AUG 20 1996

No. 95-1081

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1995

INGALLS SHIPBUILDING, INC., ET AL.,  
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

**BRIEF FOR THE FEDERAL RESPONDENT**

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65 PP



## QUESTIONS PRESENTED

1. Whether Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 933(g)(1), which requires a "person entitled to compensation" under the Act to obtain an employer's prior written approval of certain settlements with a third party who may be liable for a work-related injury, applies to an injured employee's relative who settles a potential wrongful death action while the employee is alive.

2. Whether the Secretary of Labor's delegate, the Director of the Office of Workers' Compensation Programs, is entitled to participate as a party respondent in the court of appeals when a private party seeks review of a decision of the Department of Labor's Benefits Review Board.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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No. 95-1081

INGALLS SHIPBUILDING, INC., ET AL.,  
PETITIONERS

*v.*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
ET AL.

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENT**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-17) is reported at 65 F.3d 460. The decision and order of the Benefits Review Board (Pet. App. 20-55) are reported at 28 Ben. Rev. Bd. Serv. (MB) 137, and the decision and order of the administrative law judge (Pet. App. 56-88) are reported at 26 Ben. Rev. Bd. Serv. (MB) 174.

**JURISDICTION**

The court of appeals entered its judgment on October 3, 1995, and denied a suggestion of rehearing en banc that it treated as a petition for rehearing (Pet. App. 18-19) on November 22, 1995. 71 F.3d 880. The petition for a writ of

certiorari was filed on January 2, 1996. On May 13, 1996, the Court granted review, limited to Questions 1 and 2 presented by the petition. 116 S. Ct. 1671. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 933(g), provides in relevant part:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person \* \* \* for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation \* \* \* only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed \* \* \*.

(2) If no written approval of the settlement is obtained and filed \* \* \* all rights to compensation and medical benefits under this chapter shall be terminated \* \* \*.

Other pertinent provisions of Section 33 of the LHWCA (33 U.S.C. 933) are reprinted in the Appendix., *infra*, 1a-5a.

### STATEMENT

#### A. The Statutory Framework

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, creates a comprehensive federal scheme to compensate maritime workers who are disabled, and the surviving relatives of maritime workers who are killed, due to injuries incurred

while a maritime worker is employed upon the navigable waters of the United States. Maritime employers are liable for payment of such compensation, 33 U.S.C. 904(a), for covered injuries without regard to fault for the disability or death, and have certain duties to furnish medical services in connection with injuries. 33 U.S.C. 904, 906-909. Payments to compensate for an employee's disability are paid to the employee according to a statutory scheme based on the extent of the employee's disability or the type of injury. 33 U.S.C. 908. If the injury causes the employee's death, the compensation is paid to, or for the benefit of, certain surviving relatives of the employee. 33 U.S.C. 909. In exchange for that statutory liability, the Act provides that, so long as the employer has secured its obligations under the Act, including payment of statutory benefits, 33 U.S.C. 904(a), 932(a), the liability that the Act imposes is "exclusive and in place of all other liability of such employer" to the employee, his or her relatives, and anyone otherwise entitled to recover damages from such employer on account of the employee's injury or death. 33 U.S.C. 905(a); see also 33 U.S.C. 933(i).

The LHWCA provides that, "[e]xcept as otherwise specifically provided," the Secretary of Labor "shall administer the provisions" of the Act. 33 U.S.C. 939(a). For that purpose, the Secretary is authorized to make such rules and regulations, appoint such officers and employees, and make such expenditures as may be necessary. *Ibid.* The Act also provides for the Secretary to establish compensation districts and to assign persons to the districts, as the Secretary "deems advisable," to perform much of the day-to-day administration of the Act under the authority of the Secretary. See 33 U.S.C. 939(b), 940. Although the Act refers to those persons as "deputy commissioner[s]" (*e.g.*, 33 U.S.C. 913(a)), the Secretary uses the title "district director" to refer to the persons performing the ad-



ministrative duties of deputy commissioners. See 20 C.F.R. 701.301(a)(7), 702.105. Finally, the Act establishes the Benefits Review Board, composed of members appointed by the Secretary of Labor, and provides that the Secretary shall designate a chairman of the Board to have the authority, "as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board." 33 U.S.C. 921(b)(1). Board members are subject to removal by the Secretary at his discretion. *Kalaris v. Donovan*, 697 F.2d 376, 389-397 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983); see Pet. Br. 31.

Pursuant to his statutory authority to administer the Act, including the specific authority to make rules and regulations and to appoint officers and employees, 33 U.S.C. 939(a), the Secretary established the Office of Workers' Compensation Programs (OWCP). The Secretary delegated his responsibility for administration of the benefits program under the LHWCA to the Director of the OWCP (Director). See 20 C.F.R. 701.201-701.203.<sup>1</sup>

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<sup>1</sup> The statutory language speaks in terms of duties imposed on the Secretary. In light of the Secretary's delegation of his responsibilities under the LHWCA to the Director, however, we refer throughout this brief to the Director rather than the Secretary as the bearer of the statutory duties.

In addition to administering the LHWCA benefits program, the Director is responsible for administering the benefits programs under the Defense Base Act, 42 U.S.C. 1651 *et seq.*, the former District of Columbia Workmen's Compensation Act, D.C. Code Ann. § 36.501 *et seq.* (1973), the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, Subchapter II of the Federal Employees Compensation Act (Non-appropriated Fund Instrumentalities Act), 5 U.S.C. 8171 *et seq.*, and Title IV of the Federal Coal Mine Health and Safety Act of 1969, (known as the Black Lung Benefits Act (BLBA)), 30 U.S.C. 901 *et seq.* See 20 C.F.R. 701.202(b)-(f). The first four of those Acts are direct extensions of the LHWCA, and the same regulations generally govern the administration of the programs under those Acts, with a few

Employees or surviving relatives seeking compensation under the LHWCA generally must notify the employer and may file a claim with a district director of OWCP. 33 U.S.C. 912, 913(a). Compensation is to be paid promptly by the employer to "the person entitled thereto," without issuance of a formal compensation award, except where liability is contravened by the employer. 33 U.S.C. 914(a). A district director may, upon his own initiative and at any time, investigate a case in which payments are being made without an award. 33 U.S.C. 914(h)(1), 919(c). If a dispute regarding a claim arises, a district director must conduct an investigation and "take such further action as he considers will properly protect the rights of all parties." 33 U.S.C. 914(h)(2). District directors have authority to make compensation awards. 33 U.S.C. 919(a).

If a district director is unable to resolve a claim informally, the claim is forwarded to an administrative law judge (ALJ). 33 U.S.C. 919(d). ALJs are empowered to conduct formal hearings in compliance with 5 U.S.C. 554, and to prepare compensation orders for filing with the district directors. 33 U.S.C. 919(c), (d) and (e); 20 C.F.R. 702.301-702.317, 702.331-702.351. Implementing regulations provide that the claimant and the employer (or its insurance carrier) are necessary parties to a hearing before an ALJ. 20 C.F.R. 702.333(a). The Director, represented by the Solicitor of Labor or his designee, is an interested party who may participate in ALJ hearings. 20 C.F.R. 702.333(b).

Appeals raising a substantial question of law or fact may be taken to the Benefits Review Board "by any party in interest" from ALJ decisions with respect to

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exceptions. See 20 C.F.R. 701.101, 701.102. The regulations governing administration of the BLBA are set forth immediately following the LHWCA regulations. See 20 C.F.R. Pt. 718.

benefit and compensation claims under the Act. 33 U.S.C. 921(b)(3); 20 C.F.R. 702.391, 801.102. The terms "party" and "party in interest" are defined to mean "the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken." 20 C.F.R. 801.2(a)(10). The Board reviews an ALJ's decision to determine if it is supported by substantial evidence and is in accordance with law. 33 U.S.C. 921(b)(3); 20 C.F.R. 801.102.

Under Section 21(c) of the Act, "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain a review of that order" in the court of appeals. "Attorneys appointed by the Secretary"—i.e. attorneys from the Department of Labor's Office of the Solicitor—represent "the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921." 33 U.S.C. 921(a). The Secretary has designated the Director "to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c)," and attorneys from the Office of the Solicitor therefore represent the Director in the courts of appeals. 20 C.F.R. 802.410(b).<sup>2</sup>

The Director does not have standing under the Act to seek judicial review of a Board ruling based on the Director's general areas of responsibility under the Act. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995). The Director may, however, have standing to seek review in circumstances in which the Board's ruling interferes with a specific statu-

<sup>2</sup> If an employer fails to comply with a final compensation order making an award, enforcement of the award must be obtained in a federal district court. 33 U.S.C. 921(d). An application for such enforcement may be made by any beneficiary of the award or the district director who filed the award. *Ibid.*

tory duty of the Director, such as his duties in administering the special statutory fund established by Section 44(a) of the Act, 33 U.S.C. 944(a), that assumes liability for compensation payments in particular cases under Section 8(f) of the Act, 33 U.S.C. 908(f). See *Newport News*, 115 S. Ct. at 1282 n.1 (reserving question).<sup>3</sup>

2. Section 33 of the Act, 33 U.S.C. 933, addresses the subject of compensation where third parties are liable in damages for the injury sustained. Subsection (a) of Section 33 specifies that, if a "person entitled to \* \* \* compensation" under the Act determines that a third party, i.e., "some person other than the employer or a person or persons in his employ," is liable in damages, the person need not elect whether to receive compensation under the Act or to recover damages against such third party. 33 U.S.C. 933(a). If the person accepts LHWCA compensation from an employer under a formal compensation order, however, the person must commence his or her own action against the third party within six months of acceptance of the award; otherwise, the person's rights against the third party are assigned to the employer. 33 U.S.C. 933(b). If the rights are thus assigned to the employer, but the employer does not commence an action against the third party within 90 days of that assignment, the right to bring suit reverts to the person entitled to compensation. *Ibid.*

Pursuant to Section 33(f) of the Act, "[i]f the person entitled to compensation institutes proceedings within the period prescribed in [Section 33(b)] the employer shall be required to pay as compensation under the [LHWCA] a sum equal to the excess of the amount which the Secre-

<sup>3</sup> If the Director concludes that a decision of the Board established an erroneous rule of law, the Director can alter that rule by issuing a regulation pursuant to his delegated authority under 33 U.S.C. 939(a). *Newport News*, 115 S. Ct. at 1287.



tary determines is payable on account of such injury or death over the net amount recovered" against such third party. 33 U.S.C. 933(f). If a "person entitled to compensation" enters into a settlement with a third party for an amount less than the compensation to which the person would be entitled under the LHWCA, the employer "shall be liable for compensation as determined under subsection (f) \* \* \* only if written approval of the settlement is obtained from the employer, and the employer's carrier, before the settlement is executed." 33 U.S.C. 933(g)(1).

#### B. The Circumstances Of This Case

1. Respondent Maggie Yates is the widow of Jefferson Yates, a former employee of petitioner Ingalls Shipbuilding, Inc.<sup>4</sup> Mr. Yates was a pipefitter who was exposed to asbestos during his employment with petitioner. In April 1981, Mr. Yates filed a claim for LHWCA disability benefits under Section 8 of the Act, 33 U.S.C. 908. In 1982, petitioner admitted compensability of Mr. Yates' claim for disability benefits. In May 1983, petitioner and Mr. Yates entered into a settlement, approved by the district director pursuant to 33 U.S.C. 908(i), in which petitioner agreed to pay Mr. Yates a lump sum of \$15,000 and to provide him medical benefits and payment of his attorney's fees. Pet. App. 2.

Meanwhile, in May 1981, Mr. Yates had filed a lawsuit against third parties (23 manufacturers and sellers of asbestos) seeking damages for his injuries that arose out of his exposure to the third parties' asbestos products

<sup>4</sup> Petitioner American Mutual Liability Insurance Company was the workers' compensation carrier for petitioner Ingalls, but is now in receivership. Pet. 2 n.2. Petitioner Mississippi Insurance Guaranty Association has assumed its obligations for payment of benefits under the LHWCA. *Ibid.* All further references to "petitioner" are to petitioner Ingalls, unless otherwise specified.

while he was employed by petitioner. Over time, Mr. Yates entered into partial settlements with several of the defendants in the third-party suit. Pet. App. 62-63. Respondent Maggie Yates was not a party to Mr. Yates' suit for damages but, as a condition of her husband's settlement with some of the defendants, she released her potential claims against various defendants, including in some instances her potential wrongful death claims. *Id.* at 3. Petitioner also was not a party to Mr. Yates' third-party suit, and it did not provide its approval of the settlements. None of the settlements attempted to foreclose petitioner from bringing its own third-party action. *Id.* at 63.

Mr. Yates died in January 1986 from prostate cancer. The parties stipulated that he had asbestosis that contributed to his death. Pet. App. 3. In April 1986, respondent Maggie Yates filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. 909, as Mr. Yates' widow. Mr. Yates' six adult children were not entitled to compensation under the LHWCA because they were not dependent on him, and they therefore did not file any LHWCA claims. Pet. App. 3; see 33 U.S.C. 909(b) (providing death benefits for surviving child or children); 33 U.S.C. 902(14) (non-dependent adult is not a "child").

Respondent Yates and her children pursued Mr. Yates' third-party lawsuit against the defendants who had not yet settled. That suit was converted to a wrongful death action. Pet. App. 3. Respondent Yates and her children entered into three settlements with third-party defendants totalling \$105,821.00 (\$63,680.67 net of attorney's fees and expenses). *Id.* at 3, 23. Respondent Yates, now a person entitled to compensation under the LHWCA by virtue of her status as the widow of Mr. Yates, obtained petitioner's prior written approval of those settlements in accord with Section 33(g)(1) of the LHWCA, 33 U.S.C. 933(g)(1). Pet. App. 3, 23, 64.

2. Petitioner controverted respondent Yates' claim for death benefits under the LHWCA, and the matter was referred to an ALJ for a hearing. Pet. App. 58. Petitioner admitted the compensability of respondent Yates' claim, but contended that the claim was barred by Section 33(g)(1) of the LHWCA because petitioner's prior approval had not been obtained for the pre-death settlements with certain of the third-party defendants. See Pet. App. 64-65.

The ALJ rejected petitioner's argument and held that Section 33(g)(1) did not bar respondent Yates' claim. The ALJ reasoned that respondent was not yet a "person entitled to compensation" for purposes of Section 33(g) when she joined the third-party settlements prior to Mr. Yates' death, and therefore was not subject to the requirement in Section 33(g) that the employer give its prior approval to the settlement. The ALJ ruled that potential widows are not "persons entitled to compensation" because, unlike an injured employee, the spouse of an injured employee has no cause of action for LHWCA benefits unless and until the injured employee dies, and, even then, only if the death results in part from a work-related injury. Pet. App. 68. The ALJ pointed out that, until her husband died, respondent Yates could not have known that his job-related disability would cause or contribute to his death, or that she would survive him and still be his wife at the time of death. *Ibid.* The ALJ concluded that Congress's intent was clear in Section 9 of the LHWCA, 33 U.S.C. 909, that a cause of action for death benefits does not arise until the death of the injured employee, and that respondent Yates could not have been deemed a "person entitled to compensation" until her husband died due to a work-related injury. Thus, the failure to obtain petitioner's prior ap-

proval of the pre-death settlements could not bar respondent's claim. Pet. App. 70-71.<sup>5</sup>

3. The Benefits Review Board affirmed in relevant respects, ruling that Section 33(g)(1) does not bar respondent Yates' claim. Pet. App. 30-37. The Board pointed out that, in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-479 (1992), decided after the ALJ's decision, this Court held that an injured employee becomes subject to Section 33(g)(1)'s written-approval requirement as a "person entitled to compensation" when his right to recover vests. Pet. App. 30-31 (citing *Cowart*, 505 U.S. at 475-479).<sup>6</sup> Here, the Board ruled that the right of a potential widow to receive death benefits does not vest until her husband dies as a result of a work-related injury. It noted that numerous intervening events could affect her rights, including divorce, the employee's death due to a non-work-related ailment, the widow's predeceasing the employee, or

<sup>5</sup> The ALJ also ruled that, under Section 33(f) of the Act, 33 U.S.C. 933(f), petitioner could offset its LHWCA liabilities to respondent Yates by the total amount of the net proceeds from the post-death settlements, including amounts paid to Yates' six surviving children. Pet. App. 84-86. The Benefits Review Board reversed that ruling, however, and held that petitioner's offset was limited to the net recovery attributable to respondent Yates. *Id.* at 42-44. The court of appeals affirmed. *Id.* at 12-16. In Questions 3 and 4 presented in its petition for a writ of certiorari, petitioner sought review of certain issues related to the offset, but this Court limited its grant of certiorari to Questions 1 and 2 presented by the petition. 116 S. Ct. 1671. Accordingly, we do not address the offset for the post-death settlements. We also do not address various other issues on which petitioner did not seek review, including the ALJ's award of funeral expenses under Section 9(a) of the LHWCA and of attorney's fees to respondent Yates' lawyer. See Pet. App. 72-82, 87.

<sup>6</sup> The Director participated as an interested party before the Board, see 20 C.F.R. 801.2(a)(10), 801.102(a), by responding to petitioner's appeal to the Board. Pet. App. 27.



a change in the law. Pet. App. 35. The Board therefore concluded that, because respondent had no vested right to death benefits before her husband died, she became a "person entitled to compensation" only upon the death of her husband, and therefore was not subject to Section 33(g)(1)'s written-approval requirement when she signed the pre-death settlements. Pet. App. 31-37.<sup>7</sup>

4. The court of appeals affirmed. Pet. App. 1-17. Like the Board, it read *Cowart* to hold that a "person entitled to compensation" means a person whose right to compensation has vested. *Id.* at 8-9. The Court then held that, under *Cowart*, respondent Yates was not a "person entitled to compensation" at the time of the pre-death settlements because her right to recover death benefits did not vest until her husband's death. *Id.* at 10. The court pointed out instances in which no right to death benefits under the Act would ever have accrued for respondent Yates, citing, for example, the fact that she could have predeceased her husband, she could have divorced him, or he could have died from causes unrelated to his employment. *Ibid.* Because respondent Yates' right to benefits had not vested when she entered into the pre-death settlements, the court concluded that her failure to obtain petitioner's prior written approval of those settlements under Section 33(g)(1) did not bar her subsequent claim for benefits. Pet. App. 10-11. The court of appeals expressly

<sup>7</sup> Administrative Appeals Judge Brown filed a concurring opinion in which he agreed with the opinion for the Board and further reasoned that Section 33(g)(1) does not bar respondent Yates' claim because her pre-death settlements were for an amount greater than the amount to which Mr. Yates would have been entitled under the Act. Pet. App. 45, 48-49. Administrative Appeals Judge Smith also filed a separate opinion in which he concurred on the Section 33(g)(1) issue, but dissented on an offset question that is no longer at issue. Pet. App. 52-55; see note 5, *supra*.

disagreed with the Ninth Circuit's contrary ruling in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (1993), cert. denied, 114 S. Ct. 2705 (1994), which dismissed this Court's reasoning in *Cowart* as *dicta*. Pet. App. 9-10.

In a footnote, the court of appeals also rejected petitioner's argument that the Director lacked standing to participate as a party respondent in the court of appeals. Pet. App. 6 n.2. That argument was foreclosed, the court ruled, by its ruling in a prior case that the Director is a proper respondent on review of a Board decision. *Ibid.* (citing *Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 281-284 (5th Cir. 1982), overruled on other grounds, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406-407 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984)). The court recognized that in *Newport News*, 115 S. Ct. at 1284 n.2, this Court held that the Director did not have standing to petition the court of appeals for review of the Board decision at issue in that case. But the court below pointed out that the *Newport News* Court expressly "differentiated an agency's entitlement to party-respondent status from its standing to appeal," and "intimate[d] no view on the party-respondent question." Pet. App. 6 n.2 (quoting *ibid.*).

#### SUMMARY OF ARGUMENT

I. Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 933(g)(1), provides that a "person entitled to compensation" under the Act must obtain prior written approval from the employer before settling a third-party claim for an amount less than the compensation to which the person would be entitled under the Act. Otherwise, the person's rights to compensation under the Act are terminated. That requirement does not, however, apply to persons like respondent Yates who are not entitled to compensation

under the Act at the time of the settlement. Under *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), a "person entitled to compensation" means a person who already satisfies the prerequisites for entitlement and has a vested right to recover compensation under the Act. Respondent Yates was not "entitled" to (*i.e.*, had no vested right to) death benefits under the LHWCA at the time she released her potential wrongful death claims against third parties, because her husband had not yet died.

Petitioner attempts to avoid that natural reading of the plain language of Section 33(g)(1) by ignoring the import of the phrase "person entitled to compensation," which clearly identifies to whom Section 33(g)(1) applies. Petitioner instead focuses on the phrase later in Section 33(g)(1) that provides that the only settlements by such persons that are subject to Section 33(g)(1) are those "for an amount less than the compensation to which the person (or the person's representative) would be entitled under" the LHWCA. Petitioner removes the latter phrase from its context and claims that Section 33(g)(1) is applicable to all persons "who 'would be entitled to compensation' under the LHWCA" in the future. Pet. Br. 7; see also *id.* at 8, 15-16, 20, 28 (emphasis added). Petitioner's interpretation is inconsistent with the statutory text and the Court's reasoning in *Cowart*.

The Court should reject petitioner's contention that it apply a different interpretation to Section 33(g)(1) in this case than it did in *Cowart* in order to further general policies underlying the Act. Petitioner's policy argument is rooted in its view of Section 33(g)(1) as protection for employers against imprudent settlements by claimants, and as a bar against double recoveries to claimants. The underlying premise of petitioner's argument is that, if a person like respondent Yates is not a "person entitled to compensation" under Section 33(g)(1), then the person also

is not covered by the offset provision of Section 33(f), which also applies only to "persons entitled to compensation." Interpreting the phrase in the same manner in the two sections means that an employer would not be entitled to a credit against settlements in cases such as this. Pet. Br. 9, 23-24.

In light of the reasoning of *Cowart*, it appears that petitioner is correct that the phrase "person entitled to compensation" must be interpreted in the same manner in both Section 33(f) and Section 33(g)(1). See *Cowart*, 505 U.S. at 479. Thus, Section 33(f) would permit an employer credit against its statutory liability to a person for a third-party recovery by that person only if the person was entitled to compensation at the time of the recovery, having instituted a proceeding against a third party within six months of acceptance of a compensation award. See 33 U.S.C. 933(f) and (b). Assuming that to be the case, however, the statutory scheme is not thereby rendered irrational. There is no categorical ban against overcompensation or double recovery and, in other circumstances, the LHWCA itself has been interpreted not to prevent certain collateral recoveries.

II. The Secretary of Labor's delegate, the Director of the Office of Workers' Compensation Programs (Director), is entitled to participate as a party respondent in court of appeals' proceedings when a private party seeks review of a decision of the Department of Labor's Benefits Review Board under Section 21(c) of the Act, 33 U.S.C. 921(c). Federal Rule of Appellate Procedure 15(a) requires that a federal agency be named as a respondent in all cases seeking review of agency orders. The Secretary of Labor has reasonably delegated his authority to the Director to represent the agency as a respondent under Rule 15(a). The Director is the person charged with administering and enforcing the LHWCA, and is the official whose inter-



pretation of the Act is entitled to deference. The Director therefore is the proper administrative official to be named and participate as a party in litigation challenging adjudicatory decisions under the Act.

### ARGUMENT

#### I. THE REQUIREMENT IN SECTION 33(g)(1) OF THE LHWCA TO OBTAIN PRIOR APPROVAL FROM THE EMPLOYER BEFORE SETTling A THIRD-PARTY CLAIM DOES NOT APPLY TO PERSONS, LIKE RESPONDENT YATES, WHO ARE NOT ENTITLED TO COMPENSATION UNDER THE ACT AT THE TIME OF THE THIRD-PARTY SETTLEMENT

Petitioner does not dispute that respondent Maggie Yates was the wife of its former employee, decedent Jefferson Yates, at the time of his death due to an injury sustained while he was employed by petitioner. Petitioner therefore does not dispute that respondent Yates meets the eligibility requirements for death benefits as a surviving widow under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 901 *et seq.* See 33 U.S.C. 902(16), 909. Petitioner contends, however, that all of respondent Yates' rights to compensation under the LHWCA were terminated under Section 33(g)(1) of the Act, 33 U.S.C. 933(g)(1), because she did not obtain written approval from her husband's employer before she signed settlement agreements regarding her potential wrongful death causes of action against certain third parties due to the third parties' liability for injuries to her husband. See Pet. Br. 7-9, 11-28.

Contrary to petitioner's contention, Section 33(g)(1) did not apply to respondent Yates when she entered into those settlements, because her husband was still alive. Section 33(g)(1) applies only to persons who are "entitled to compensation" under the Act at the time they enter into a

settlement. Respondent Yates was not entitled to compensation under the Act at the time of the pre-death settlements because any entitlement to death benefits under the LHWCA vests only after the death of the covered employee.

Petitioner attempts to avoid this straightforward conclusion by urging the Court to construe Section 33(g)(1) in a manner that is contrary to the normal, natural meaning of its text and that is inconsistent with this Court's interpretation of that provision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992). Petitioner asserts that the Court should depart from the plain language of the Act in order to further the general policy goal of protecting employers by ensuring that they reduce their statutory liability by obtaining credit for third-party settlements. The Court made clear in *Cowart*, however, that "[t]he controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." 505 U.S. at 476. Although recognizing that its application of the plain meaning of the statutory text would likely lead to harsh results for many maritime workers and their families, the Court emphasized that "[i]t is the duty of the courts to enforce the judgment of the Legislature[;] [i]t is Congress that has the authority to change the statute, not the courts." *Id.* at 483-484. The same principles govern here.

In any event, no legislation pursues its purposes at all costs. Because the employer does not owe compensation under the Act at the time of the third-party settlement in cases such as this, Congress reasonably could have concluded that the employer does not have a sufficient stake to be deemed a real party in interest in the settlement. By the same token, interpreting Section 33(g)(1) according to its plain meaning furthers the

countervailing interest in avoiding harsh results for the families of injured workers.

**A. The Text Of Section 33(g)(1) Makes Clear That Its Prior Approval Requirement Applies Only To Persons Who Are Entitled To Compensation Under The Act At The Time Of Settlement**

1. Section 33 of the LHWCA establishes that a person entitled to compensation may seek recovery of damages from a third party without categorically surrendering his or her rights to compensation under the Act. As discussed more fully above, see pp. 7-8, *supra*, Section 33(a) addresses the situation in which a "person entitled to compensation" under the Act determines that a third party—"some person other than the employer or a person or persons in his employ"—is liable to the person in damages on account of a disability or death for which compensation under the Act is payable. 33 U.S.C. 933(a). Section 33(a) explicitly states that the person entitled to compensation need not elect whether to receive compensation under the Act or to recover against the third party. Instead, Section 33(b) provides that the person may receive compensation under the Act and also pursue an action against the third party, subject to certain limitations. 33 U.S.C. 933(b).

If the person entitled to compensation obtains a recovery from a third party, the employer receives a credit against its statutory liability to the person in the amount of that recovery. 33 U.S.C. 933(f). The employer remains liable only for the amount of LHWCA benefits that is greater than the net third-party recovery. *Ibid.*

If the person entitled to compensation enters into a settlement with a third party, however, and the amount to be recovered is less than the compensation to which the person would be entitled under the LHWCA, the employer does not remain liable for any benefits unless the person

entitled to compensation adheres to certain procedures. Specifically, Section 33(g)(1) explains that the employer "shall be liable for compensation as determined under subsection (f) \* \* \* only if written approval of the settlement is obtained from the employer, and the employer's carrier, before the settlement is executed." 33 U.S.C. 933(g)(1). If prior written approval is not obtained, all the person's rights to compensation and medical benefits under the Act are terminated. 33 U.S.C. 933(g)(2).

By its terms, the prior approval requirement of Section 33(g)(1) of the LHWCA applies only if a "person entitled to compensation \* \* \* enters into a settlement with a third person." 33 U.S.C. 933(g)(1).<sup>8</sup> When the Court interpreted "person entitled to compensation" in *Cowart*, it concluded:

Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies \* \* \*. It means only that the person satisfies the prerequisites attached to the right. See generally *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (discussing property interests protected by the Due Process Clause and contrasting an entitlement to an expectancy); Black's Law Dictionary 532 (6th ed. 1990) (defining "entitle" as "[t]o qualify for; to furnish with proper grounds for seeking or claiming").

505 U.S. at 477. The Court therefore held that a claimant for disability benefits "became a person entitled to compensation at the moment his right to recovery vested," not, for example, when his employer admitted liability.

<sup>8</sup> Section 33(g)(1) also applies when the representative of a person entitled to compensation enters into a settlement. That term refers to the legal representative of a deceased employee, 33 U.S.C. 933(c). Petitioner does not contend that respondent Yates was such a representative when she entered into the pre-death settlements.



*Ibid.*; see *Black's Law Dictionary* 1563 (6th ed. 1990) (“[v]ested” means “[f]ixed; accrued; settled; absolute; complete”).

Respondent Yates was not a “person entitled to compensation” within the meaning of Section 33(g)(1) or the Court’s reasoning in *Cowart* at the time she joined in the pre-death settlement agreements, for which she did not receive prior employer approval. Like the claimant in *Cowart*, 505 U.S. at 477, respondent Yates became a person entitled to compensation only when her right to recover benefits under the LHWCA vested.

Because respondent Yates seeks death benefits, rather than disability benefits, she did not become entitled to such benefits at the time of her husband’s disabling injury. Whether she would become eligible for death benefits under the LHWCA could not have been determined until after the death of her husband, because only then could it be determined whether she met the various statutory prerequisites for eligibility. First, for example, respondent would have to be a survivor at the time of her husband’s death; she would never become entitled to death benefits if she predeceased her husband. 33 U.S.C. 909. Second, respondent would have to remain married to her husband at the time of his death; if she and her husband divorced at any time after his injury and before his death, she could not qualify for death benefits. 33 U.S.C. 909(b), 902(16). Third, respondent could not simply remain married to her husband in name only to qualify; at the time of his death, she would have to be living with him, be supported by him, or be living apart as a result of his having deserted her. See 33 U.S.C. 902(16); *Thompson v. Lawson*, 347 U.S. 334, 336 (1954) (regardless of whether husband and wife were still legally married, the fact that the wife was living apart from the husband at the time of his death for a reason other than his desertion meant that

she was not a widow within the meaning of the LHWCA, and therefore was not entitled to death benefits). Fourth, when respondent’s husband died, it would have to be determined that his death was caused at least in part by the employment-related injury; if her husband died from injuries sustained in some other manner, *e.g.*, in a car accident, respondent could not qualify for death benefits. 33 U.S.C. 909 (death benefits available “[i]f the injury causes death”).<sup>9</sup>

Petitioner and its *amici* ignore the clear provisions of the Act and inaccurately suggest that petitioner’s eligibility was established, and her right to death benefits vested, at the time of her husband’s injury. See Pet. Br. 20-21; Nat’l Ass’n of Waterfront Employers *et al.* Amici Br. 5, 8, 17-19. They cite Section 9(f) of the Act, which provides that “[a]ll questions of dependency shall be determined as of the time of the injury.” 33 U.S.C. 909(f). But as pointed out above, dependency at the time of injury is not determinative of entitlement to death benefits where, as here, the person claims benefits as a widow. Indeed, a widow can be eligible for death benefits even if she was not dependent on her husband at the time of his death if she nonetheless lived with him, or lived apart from him for justifiable cause or desertion.

Petitioner is wrong to state (Pet. Br. 21) that respondent Yates’ “status as a dependent widow was established as of the time of her husband’s injury,” and that she therefore was bound by the approval requirement of Section 33(g)(1) from that time forward. The LHWCA could not be clearer regarding who qualifies as a widow for purposes of the Act: “widow or widower” includes only the

<sup>9</sup> In the instant case, respondent Yates’ husband died from prostate cancer, but the parties stipulated that his asbestosis contributed to his death. Pet. App. 3.

decendent's wife or husband living with or dependent for support upon him or her *at the time of his or her death*; or living apart for justifiable cause or by reason of his or her desertion *at such time*." 33 U.S.C. 902(16) (emphasis added). As a result, whether a person is a widow or widower for purposes of the LHWCA cannot be determined prior to the death of the worker. Petitioner's list (Pet. Br. 22) of other facts that are determined at the time of injury under the statutory scheme simply reinforces the fact that Congress did not so provide in the case of determining whether a person is a widow entitled to death benefits.

Moreover, courts "have consistently held that the right to death benefits is separate and distinct from the right to disability benefits and does not arise until death occurs." *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); see also, *e.g.*, *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76, 79 (4th Cir. 1950); *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 664-665 (2d Cir.), cert. denied, 304 U.S. 565 (1938); 2 Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 64.10 (1996); cf. *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874) (rights of person's heirs and devisees "become fixed and vested" only after person's death). The authorities cited by petitioner (Pet. Br. 21-22) do not support its argument that a right to death benefits vests at the time of injury. In *Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Spence*, 591 F.2d 985, 987 (4th Cir.), cert. denied, 444 U.S. 963 (1979), the court recognized that a right of action for death benefits arises only at the time of an employee's death, and merely held that, because the source of liability traces back to the employee's injury, the insurer liable for the injury should also be liable for death benefits. In *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 902 (9th Cir. 1979), as in *Puig*, *Hampton Roads*, and *International Mercantile*, the court rejected reliance on

the time of injury for purposes of determining what law applied. The court held that Congress did not violate due process when it changed eligibility criteria for death benefits, after the employee had sustained an injury but before the employee died, because rights to death benefits first vested at the time of death. *Id.* at 902. Courts have therefore distinguished between when liability is "incurred" and when entitlement to and liability for compensation arises.<sup>10</sup>

Finally, respondent Yates might never have become entitled to death benefits under the Act because Congress could have amended the LHWCA, prior to Mr. Yates' death, to change the conditions for entitlement. In fact, Congress did just that in 1984, although in ways that did not affect respondent Yates. For example, Congress eliminated the compensability of the deaths of workers based solely on the fact that they were permanently totally disabled at the time of death by employment-related conditions. Congress made employment-relatedness of the death itself a prerequisite to the right to death benefits and explicitly made that change applicable to all post-amendment deaths. See Pub. L. No. 98-426, § 9(a), 98 Stat.

<sup>10</sup> Petitioner's *amici* assert that the agency's statement during a rulemaking proceeding "negates every aspect of its litigating position." Nat'l Ass'n of Waterfront Employers *et al.* Amici Br. 3; see also *id.* at 25. *Amici* point to a 1986 discussion by the Secretary of Labor of a rule relating to the 1984 amendments to the LHWCA, in which he stated that "coverage of a death claim does not turn on when 'death is sustained,'" Pet. Br. 5, 17 (quoting 51 Fed. Reg. 4272 (1986)). *Amici* suggest that this statement is dispositive of when respondent Yates became entitled to benefits under the Act. *Amici* take the statement out of context and disregard the clear statements elsewhere in the same document that "a claim for survivor benefits does not arise until the employee's death," and that, before that time, there is no claim under the Act that can be settled. 51 Fed. Reg. at 4276.



1647. Congress also changed the Act's coverage provisions in 1984, withdrawing coverage from a number of narrowly specified circumstances of maritime employment. *Id.* §§ 2(a), 3(a), 98 Stat. 1639-1640. Congress could also, before a worker's death, add further qualifications to the right to death benefits that would be prerequisites for eligibility for the workers' survivors.

Hence, contrary to petitioner's argument (Pet. Br. 20-22), the mere fact of injury to her husband was insufficient to establish that respondent Yates was entitled to (*i.e.*, had a vested right to) death benefits under the LHWCA. At best, at the time of the pre-death settlements, respondent Yates had an "expectancy" that might or might not materialize.<sup>11</sup>

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<sup>11</sup> Petitioner appears to contend that respondent Yates must have been entitled to compensation under the Act at the time of her pre-death settlements because, otherwise, she would not have been entitled to those settlements. See Pet. Br. 22 ("To the extent entitlement existed, Mrs. Yates was just as entitled to receive compensation under the LHWCA as she was entitled to recover for her husband's wrongful death when she entered into the unapproved settlements during his lifetime."); see also *id.* at 23 n.7. But, petitioner was not "entitled" to any recovery in a wrongful death action at the time of the pre-death settlements, because her husband was still alive. Respondent Yates released her *potential* wrongful death claims as a condition of the settlement of her husband's claims against certain third parties.

When a third party enters into a settlement, the party makes a calculated decision to settle the overall litigation based on a multitude of factors, many of which may have nothing to do with whether all other settling parties were "entitled" to any recovery. For example, in many settlements, the third party may decide that the cost of litigation would be greater than the price of the settlement or that one plaintiff is so sympathetic that a trial would lead to a large damages judgment even though the plaintiff is not lawfully entitled to such. Here, the third parties obviously were interested in resolving all questions of their liability arising from the injury to Mr. Yates, including any potential wrongful death claims that might (or might not) later

2. Petitioner attempts to avoid the natural, normal reading of Section 33(g)(1) by ignoring the import of the phrase "person entitled to compensation." Petitioner instead focuses on a phrase appearing later in Section 33(g)(1) that provides that the only settlements of Section 33(a) actions that are subject to Section 33(g)(1) are those "for an amount less than the compensation to which the person (or the person's representative) would be entitled under" the LHWCA. Petitioner removes the latter phrase from its context and contends that Section 33(g)(1) is applicable to all persons "who 'would be entitled to compensation' under the LHWCA" in the future. Pet. Br. 7; see also *id.* at 8, 15-16, 20, 28.

Petitioner urges adoption of its "forward looking interpretation" of Section 33(g)(1) because other sections of the LHWCA rely on a forward looking approach. Pet. Br. 16 (33 U.S.C. 902(14) (allowing posthumous children to recover death benefits); 33 U.S.C. 910(f) (awards of death benefits and permanent total disability benefits subject to future adjustments)). But all petitioner proves by its references to other provisions of the Act is that Congress made clear in the LHWCA when it intended for a provision to be "forward looking," and when it did not so intend. The relevant language in Section 33(g)(1) is not "forward looking."

The phrase "person entitled to compensation" identifies the persons who are subject to the Section's written approval requirement. By contrast, the phrase on which petitioner relies—"would be entitled"—is contained in the

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arise. Respondent Yates' release of any such potential claims did not signify a then-present entitlement to recover based on a death that had not occurred. In any event, it would be prejudicial to maritime employers generally to conclude that any potential LHWCA claimant who manages to obtain a third-party settlement is thereby also entitled to the LHWCA benefits he or she claims.

description of the type of settlements by such persons that are subject to the approval requirement: settlements "for an amount less than the compensation to which the person (or the person's representative) would be entitled" under the Act. 33 U.S.C. 933(g)(1); see Pet. Br. 15-17, 20. Under the latter phrase, for example, the amount of the settlement must be compared to the total amount of compensation to which the person "would be" entitled over his or her lifetime, not just the amount that had accrued as of the date of settlement. *Linton v. Container Stevedoring Co.*, 28 Ben. Rev. Bd. Serv. (MB) 282, 287-288 (1994). Thus, petitioner correctly points out (Pet. Br. 16) that, when determining whether a settlement is for less than the compensation to which the person "would be entitled" under the LHWCA, the Act requires that the amount of the person's future entitlement also be taken into account. Congress thereby made clear the extent to which it intended Section 33(g)(1) to be "forward looking"—specifically, in calculating the amount of compensation, but not in identifying the persons subject to Section 33(g)(1) in the first place. It is not for the courts to expand the coverage to include other persons as well.

Moreover, the trigger for Section 33(g)(1)'s approval requirement is unambiguously written in the present tense—"If the person entitled to compensation (or the person's representative) enters into a settlement with a third person." 33 U.S.C. 933(g)(1). It thus is clear that, in order for the provision to apply, the person must be "entitled to compensation" at the time he or she "enters into a settlement." Petitioner's construction would require that the present tense of Section 33(g)(1) be changed either to "would be entitled" or to "has entered." Thus, Section 33(g)(1) cannot be read to apply to situations in which a person, like respondent Yates, became entitled to compensation under the Act at some point in time *after* she

entered into a settlement of what was, at the time of settlement, only a potential cause of action against a third party.

3. The Ninth Circuit's decision in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (1993), cert. denied, 114 S. Ct. 2705 (1994), upon which petitioner relies (Pet. Br. 16-17, 19-20), is inconsistent with this Court's decision in *Cowart*. Faced with the same issue presented by the instant case, the Ninth Circuit held that "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment." 1 F.3d at 846. The Ninth Circuit recognized that this Court's opinion in *Cowart* contains "language that in isolation appears to support" the interpretation adopted by the court of appeals in the instant case. *Id.* at 847. But the Ninth Circuit found "no reason \* \* \* to assume that the Supreme Court had the present situation in mind when it uttered these dicta," and it declined "to give the Supreme Court's statement a binding effect that there is no reason to believe the Court intended." *Ibid.* As the court below recognized (Pet. App. 10), however, *Cowart's* reasoning cannot be dismissed as "dicta," because it was essential to the Court's understanding of the term "entitlement."

Petitioner suggests (Pet. Br. 18-21) that the *Cretan* interpretation is consistent with *Cowart*. But, in *Cowart*, the Court was presented with the question whether, in order to be a "person entitled to compensation" at the time of settlement within the meaning of Section 33(g)(1), a person must be receiving compensation (or must have received either an acknowledgment by the employer of entitlement or an adjudication of entitlement). The Court answered that question in the negative, concluding that a person who "qualifies" for compensation at the time of the settlement, regardless of whether the right has been acknowledged or adjudicated, is subject to the prior



approval requirement in Section 33(g). 505 U.S. at 477. In this case, respondent Yates did not "qualif[y]" for compensation under the LHWCA when she released potential wrongful death claims against third parties prior to her husband's death.

Petitioner's argument that Section 33(g)(1) applies equally to a person "who would be entitled to compensation in the future" is inconsistent with the Court's approach in *Cowart* in another respect as well. If petitioner were correct, Section 33(g)(1) would have applied to the claimant in *Cowart* regardless of whether he became a "person entitled to compensation" when he qualified for compensation, or later, when he received the compensation or obtained an acknowledgment or judgment that he would receive it. At either point in time, he would have been a person who "would be" entitled to compensation when his claim was adjudicated. Thus, if petitioner were correct, the Court would never have had to address the question presented in *Cowart*. The *Cowart* Court correctly recognized, however, that "entitlement" status at the time of settlement is the critical factor.

#### **B. Petitioner's Policy Arguments Do Not Alter The Plain Meaning Of The Statutory Text**

Because Section 33(g)(1) "speaks with clarity," any "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Cowart*, 505 U.S. at 475. Petitioner nevertheless urges the Court to read "person entitled to compensation" to mean person who "would be" entitled to compensation, so as to avoid what petitioner perceives to be an unfair result.

1. In *Cowart*, the Court recognized the harsh results that its adherence to the plain meaning of the statutory text would likely have on "significant numbers of injured workers or their families." 505 U.S. at 483. The Court

nonetheless declined to deviate from that interpretation because "Congress ha[d] spoken with great clarity to the precise question raised by [that] case." *Ibid.* The Court emphasized that "[i]t is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. \* \* \* If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts." *Id.* at 483-484. See also *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981) ("the wisest course [in construing the LHWCA] is to adhere closely to what Congress has written"). The same principles govern the instant case. The Court therefore should adhere to the plain meaning of Section 33(g)(1) and reject petitioner's reliance on general policies that cannot be reconciled with the statutory text in the circumstances of this case.<sup>12</sup>

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<sup>12</sup> To the extent the Court finds any ambiguity in the statutory text, the Director's construction of Section 33(g) should be adopted because it constitutes a reasonable interpretation of the Act. As the Court recognized in *Cowart*, 505 U.S. at 476, 480-481, the Director had taken the position, until after the court of appeals' decision in that case, that a "person entitled to compensation" under Section 33(g) was a person receiving compensation or acknowledged by the employer to be entitled to it. In light of the ruling by the en banc court of appeals in *Cowart*, however, and further consideration of the 1984 amendments, the Director no longer defended that construction. Since *Cowart*, the Director has consistently interpreted Section 33(g) in the manner adopted in the Fifth Circuit's ruling below.

The Director's reasonable interpretation warrants judicial deference because he represents the agency charged with administering the LHWCA under 33 U.S.C. 939(a) and 20 C.F.R. 701.202(a). See *Cowart*, 505 U.S. at 476 (recognizing deference is generally owed to the Director); *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992); *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 258 (4th Cir. 1991); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1046

2. a. Despite the clear message of *Cowart*, petitioner's central contention is that the Court should read Section 33(g)(1) differently in this case to further the policy interests that underlie that provision. Petitioner argues that adherence to the Fifth Circuit's interpretation of "person entitled to compensation" would defeat Section 33(g)'s purpose of protecting employers' financial resources by permitting employers to obtain credits against their statutory liability based on third-party settlements. See Pet. Br. 7-8, 12, 13, 17, 23, 26-27.<sup>13</sup>

(5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983); see also *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159-160 (1987) (Director's construction of analogous Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, is entitled to deference); cf. *Martin v. OSHRC*, 499 U.S. 144, 154 (1991) (deference should be given to Secretary's interpretation of regulation promulgated under Occupational Safety and Health Act of 1970, rather than to interpretation by Occupational Safety and Health Review Commission). But see *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 59 (3d Cir. 1992) (neither Board nor Director is entitled to special deference regarding LHWCA); *American Ship Bldg. Co. v. Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989) (same).

<sup>13</sup> Resolution of the Section 33(g)(1) issue is important not only for cases such as this one, involving tort settlements by potential death-benefits claimants, but also a more numerous group, involving settlements by potential disability claimants. Most cases in the latter category involve individuals with diagnosed but benign or minor occupational diseases (generally related to asbestos exposure) that are not yet disabling, and that therefore do not yet constitute an "injury" for most purposes under the LHWCA. See note 17, *infra*. The Director pointed out in his brief in *Cowart* that, in such cases, "the settlement of a third party claim before the employee becomes disabled may not be subject to the prior approval requirement." 91-17 Fed. Resp. Br. at 36-37 n.29 (citing *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 560 (9th Cir. 1990)). Thus, contrary to the assertion of amici (see Nat'l Ass'n of Waterfront Employers *et al.* Amici Br. 10), the Director does not apply different interpretations of Section 33(g)(1) to claims for disability benefits under 33 U.S.C. 908 and claims for death benefits under 33 U.S.C. 909.

Petitioner is correct that, as a general matter, Section 33(g)'s written approval requirement serves that employer interest. *Cowart*, 505 U.S. at 482; *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968). Specifically, Section 33(g)(1) protects an employer, which has a statutorily mandated obligation to pay compensation to a person entitled to compensation, from improvident third-party settlements by that person.<sup>14</sup> "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam); see also *PBGC v. LTV Corp.*, 496 U.S. 633, 646-647 (1990).

In *Cowart*, this Court observed that, because Section 33(f) provides that a recovery from a third party "reduces the compensation owed by the employer," the employer "is a real party in interest" in any recovery that might reduce or extinguish the employer's liability. 505 U.S. at 482. It

<sup>14</sup> Amicus Bethlehem Steel quotes (Br. 3, 8) the Director's statement in his court of appeals brief in *Cretan* that he agrees with the employer's description of the "general purpose and plan" of Section 33(f) and (g). Bethlehem Steel contends that the Director thereby acknowledged that his post-*Cowart* construction of "person entitled to compensation" would "thwart Congress' plans and purposes." Each time that Bethlehem Steel repeats that passage, however, it fails to include the sentence that immediately followed the quoted material. The Director went on expressly to state in the *Cretan* brief that, "where the plain terms of the statute do not encompass the facts of the case, the argument that the provision *should* extend to those facts is properly cognizable only by Congress." Resp. Director, OWCP, Br. at 29, *Cretan v. Bethlehem Steel Corp.*, *supra* (Nos. 90-70589, 90-70634).



therefore is by no means obvious that Section 33(g)(1) should be understood to protect not only an employer that has a legal obligation to the employee at the time of settlement, but also an employer that has no such legal obligation and that may, in fact, never have such an obligation to the person who is settling a claim (or potential claim) against a third party. In the latter situation, because compensation is not "owed by the employer" and the employer therefore has only a *potential* claim to share in the proceeds, Congress reasonably could have concluded that the employer does not have a sufficiently concrete stake to be accorded the status of a "real party in interest" in the settlement. That is especially so in light of the countervailing hardship that the prior approval requirement may work on injured workers or their families, as this Court recognized in *Cowart*, 505 U.S. at 483. In short, the employer's ability to obtain an offset against its statutory liability in the amount of other recoveries received by claimants is not so sacrosanct as petitioner repeatedly claims. If Congress had intended for the employer's offset to be maximized and protected at all costs, it presumably would have assigned the cause of action to the employer without reservation; but Congress did not do so. See 33 U.S.C. 933(a) and (b).

In any event, application of the plain meaning of Section 33(g)(1) does not "eliminate[]" all protection for employers from unreasonable pre-death releases of potential wrongful death claims. Such releases are often made as part of a disabled employee's settlement, and therefore often involve a "person entitled to compensation" (the disabled employee) who must obtain written approval if his part of the settlement is for less than the compensation to which he would be entitled under the Act. Also, if the employer has paid compensation to the employee, as petitioner did to Jefferson Yates (Pet. App. 2), the employer would have a

right to intervene in the employee's suit to protect its judicially-recognized right of subrogation. See, e.g., *The Etna*, 138 F.2d 37, 41-42 (3d Cir. 1943). These circumstances give employers considerable leverage toward ensuring that employees negotiate reasonable settlements.<sup>15</sup> Employers also may persuade third parties to negotiate reasonable settlements by attempting to sue the third parties directly in an independent cause of action. See, e.g., *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 538 (1983); *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969); *Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corp.*, 696 F.2d 703, 706 (9th Cir. 1983); *Louviere v. Shell Oil Co.*, 509 F.2d 278, 282-284, modified on petition for reh'g, 515 F.2d 571 (5th Cir. 1975), cert. denied, 423 U.S. 1078 (1976).

b. Petitioner's policy argument boils down to the contention that the sole purpose of Section 33 is to prevent double recoveries to claimants and that that purpose would be defeated by the Director's interpretation. Pet. Br. 18, 25. The underlying premise of petitioner's argument is that, if a person like respondent Yates is not a "person entitled to compensation" under Section 33(g)(1) when she joins in a pre-death settlement, then the person also is not covered by the offset provision of Section 33(f), which also applies to third-party recoveries by a "person entitled to compensation." Interpreting the phrase in the same manner in the two sections means that an employer would not be entitled to a credit against settlements in cases such as

<sup>15</sup> In the 1984 amendments to the LHWCA, Congress further assisted employers by providing a forfeiture of "all rights to compensation and medical benefits under this Act" if "the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person." Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (enacting 33 U.S.C. 933(g)(2)).

this. Pet. Br. 9, 23-24. Petitioner argues that "such a 'consistent interpretation' would render such settlements totally useless and of no account to employers." Pet. Br. 9.

In one respect, the Director agrees with petitioner. In light of the reasoning of *Cowart*, it appears that the phrase "person entitled to compensation" must be interpreted in the same manner for purposes of both Section 33(f) and Section 33(g)(1). See *Cowart*, 505 U.S. at 479. Thus, Section 33(f) would permit an employer a credit against its statutory liability to a person for a recovery by that person from a third party only if the person was entitled to compensation at the time of the recovery, having instituted proceedings prior to the expiration of six months after acceptance of a compensation award. See 33 U.S.C. 933(f) and (b). That result is contrary to the Director's pre-*Cowart* interpretation. But just as the Director recognized that his interpretation had to be changed with regard to Section 33(g)(1) in light of the construction of that Section by the court of appeals and this Court in *Cowart*, he recognizes that his interpretation of Section 33(f) also must now be consistent with the ruling and reasoning of *Cowart*.<sup>16</sup> The Director's

<sup>16</sup> Before *Cowart*, the Director's interpretation of "person entitled to compensation" depended, in part, on the context in which that phrase was used. Thus, the Director interpreted the phrase differently for purposes of Section 33(f) than he did for purposes of Section 33(g)(1). See note 12, *supra*. With regard to Section 33(f), the Director did not "require the claimant's status as a 'person entitled to compensation' to be determined at any particular time." *Force v. Director, OWCP*, 938 F.2d 981, 984-985 (9th Cir. 1991). That interpretation was given deference by the Ninth Circuit in an earlier case. See *ibid.*; *Cretan*, 1 F.3d at 847-848 (discussing Director's prior interpretation of Section 33(f)); see Pet. Br. 25-26 (discussing the *Force* court's deference to the Director's pre-*Cowart* interpretation). After *Cowart*, however, the Director reconsidered his position and changed his interpretation to conform to the statutory construction adopted by this Court. The

former construction of the phrase for purposes of Section 33(f) was based on his view of the underlying policy at stake, not on the literal interpretation of the statutory text, as in *Cowart*. In the Director's view, the principles of statutory construction followed in *Cowart* require that the Director's former construction of Section 33(f) be rejected.

In any event, the Court need not resolve the question whether Section 33(f) applies to the circumstances of this case because that question was not before the court of appeals or the Board. The questions of offset under Section 33(f) that the lower court addressed concerned offsets for settlements into which respondent Yates entered *after* her husband's death (and therefore *after* she was a "person entitled to compensation" under the Act), and for which she obtained prior written approval from petitioner under Section 33(g).

Moreover, if we assume that an employer credit is not available under Section 33(f) in the instant circumstances, that result does not render the statutory scheme irrational. For contrary to petitioner's unstated assumption, "[t]he law contains no rigid rule against over-compensation." *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1470 (1994) (adopting "proportionate share" method of calculating liability of nonsettling defendant in admiralty case). Consistent with that proposition, the LHWCA has been construed to allow double recovery in certain circumstances. Cf. *Brown v. Forest Oil Corp.*, 29 F.3d 966,

*Cowart* Court had expressly criticized the Director's prior practice of having "adopted differing interpretations of the identical language in §§ 33(f) and 33(g)." *Cowart*, 505 U.S. at 479. Therefore, in *Cretan*, the Director argued (unsuccessfully) that Section 33(f) does not provide an employer a credit against its liability for the amount recovered by a person from a third party unless that person comes within the meaning of "person entitled to compensation" as construed in *Cowart*.



971-972 (5th Cir. 1994) (action under Section 5(a) against employer that failed to secure payment of compensation); *Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 334 (5th Cir. 1991) (under Section 33, employee may offset reimbursed medical expenses against his third-party recovery, thereby requiring employer to pay a larger amount as deficiency compensation); *Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 128-129 (9th Cir. 1988) (Section 3(e)'s credit for amounts employee receives under other workers' compensation laws does not include veterans disability benefits); *Carter v. Director, OWCP*, 751 F.2d 1398, 1404 (D.C. Cir. 1985) (Scalia, J.) (no reduction of liability on the part of special statutory fund on account of third-party recovery, absent express statutory authority). State courts have also recognized that a worker's compensation statute does not have to protect employers against a claimant's possible double recovery from a third party. See *K-Mart Apparel Corp. v. Temples*, 401 S.E.2d 5, 7 (Ga. 1991) (state law's failure to provide subrogation against third-party recovery is not fundamentally unfair even though it permits double recovery); *Transcontinental Ins. Co. v. Walsh*, 621 S.W.2d 461, 463-464 (Tex. Civ. App. 1981) (construing statute not to allow offset for pre-death settlement because surviving spouse was not a "workmen's compensation beneficiary \* \* \* entitled to compensation" at the time of settlement).

Moreover, although Congress has enacted provisions that reduce an employer's LHWCA liability when persons entitled to compensation receive funds in certain specified circumstances, no credit can be allowed (absent further action by Congress) if the terms of the statutory provision do not cover a particular collateral recovery. See *United Brands Co. v. Melson*, 594 F.2d 1068 (5th Cir. 1979) (employer not entitled to credit against its liability for amount worker received from state workers' compensation

settlement with different employer), and Pub. L. No. 98-426, § 3(b), 98 Stat. 1641 (amending LHWCA to grant employers such a credit). In the absence of any such action by Congress here, neither the Director nor the courts have the authority to ignore the plain meaning of the LHWCA in order to foreclose "double recovery"—any more than either could do so, for example, to allow credit to employers for life-insurance proceeds or survivors' pension rights, for which no credit is now allowed.<sup>17</sup>

<sup>17</sup> At the time of *Cowart*, the Director noted that difficulties under Section 33(g) could arise in occupational disease cases, where third-party litigation is often complex and costly, and where there are often multiple defendants with limited assets and claimants who frequently settle for relatively small amounts. 91-17 Fed. Resp. Br. at 35. The Director did not believe that those concerns justified a departure from the plain language of Section 33(g) in *Cowart*, in part because of some limitations inhering in that Section—including that a settlement of a third-party claim before an employee becomes disabled may not be subject to the prior approval requirement. 91-17 Fed. Resp. Br. at 36 & n.29. The Director also believed that difficulties for occupational disease claimants were balanced by certain features of the 1984 amendments to the LHWCA that made it easier for such claimants to recover LHWCA benefits. *Id.* at 37.

After *Cowart*, some employers, including petitioner, have urged that *Cowart* be interpreted to eliminate their existing liabilities—and potential, future liabilities—for thousands of occupational disease claims, contrary to the Director's view that at least some such claims should not even be adjudicated. See *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 81 F.3d 561 (5th Cir. 1996); *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 135-136 (5th Cir. 1994). Those attempts are inconsistent with the Director's view, expressed in *Cowart*, concerning restrictions that still apply to Section 33(g), and they could defeat Congress's attempt, through the 1984 LHWCA amendments, to assist occupational disease claimants. Among other things, the 1984 amendments redefined the meaning of "injury" and extended the time for pending cases, as well as for other cases, in which an employee with an occupational disease has to give notice of injury and file for compensation under the LHWCA. See Pub. L.

**II. THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS IS ENTITLED TO PARTICIPATE AS A PARTY RESPONDENT IN THE COURT OF APPEALS WHEN A PRIVATE PARTY SEEKS REVIEW OF A DECISION OF THE BENEFITS REVIEW BOARD**

A. In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995), this Court held that Section 21(c) of the LHWCA, 33 U.S.C. 921(c), does not grant the Director of the Office of Workers' Compensation Programs a right to petition a court of appeals to review decisions of the Benefits Review Board in cases in which the Director's claim to standing relies "solely upon the mere existence and impairment of [the Director's] governmental interest" as administrator of the LHWCA. 115 S. Ct. at 1285. The Court concluded that, when that is the Director's only interest, the Director is not a person "adversely affected or aggrieved" by the Board order, within the meaning of Section 21(c). *Id.* at 1284-1285. The Court expressly reserved judgment on certain other issues concerning the Director's participation in court of appeals' reviews of Board decisions under Section 21(c). Thus, the Court indicated that the Director may have standing to seek review in limited circumstances where the Board's ruling interferes with a specific statutory duty of the Director, such as the Director's duties in administering the special statutory

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No. 98-426, §§ 11(a), 12, 28(a) and (g), 98 Stat. 1648, 1649, 1655. If Section 33(g) applies as expansively as petitioner argues, then those provisions could be meaningless for most claimants, who either have entered or can be expected to enter into settlements in asbestos litigation. But see *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 332-333 (E.D. Pa. 1994) (concluding that Section 33(g) did not apply to nationwide class action asbestos settlement), vacated on other grounds, 83 F.3d 610 (3d Cir. 1996).

fund established by Section 44(a) of the Act, 33 U.S.C. 944(a), that assumes liability for compensation payments in particular cases under Section 8(f) of the Act, 33 U.S.C. 908(f). See *Newport News*, 115 S. Ct. at 1282 n.1 (reserving question). The Court also expressly declined to decide "whether the Director (rather than the Benefits Review Board) is the proper party respondent to an appeal from the Board's determination." *Id.* at 1284 n.2.

Petitioner now contends (Pet. Br. 10) that the Director must meet the same Article III standing requirements as a party litigant to appear as a respondent in the court of appeals. A plaintiff (or a petitioner in the court of appeals under the LHWCA) must establish standing to satisfy the "case or controversy" requirement of Article III of the United States Constitution and (subject to abrogation by Congress) certain prudential limitations as well. See, e.g., *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 116 S. Ct. 1529, 1533-1534 (1996). Once a plaintiff or petitioner establishes standing, however, different considerations normally determine who else may be a party to the case. For example, in this Court, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court," and are considered respondents, unless they have no interest in the outcome of the certiorari petition. Sup. Ct. R. 12.6. By analogy, the Director, as a party before the Board, 20 C.F.R. 801.2(a)(10), 801.102(a), should be considered a party respondent entitled to file documents in court of appeals proceedings to review Board orders.

The Director's entitlement to appear as a party respondent in the court of appeals in cases being reviewed under Section 21(c) is not contingent on his meeting Article III standing requirements because, by definition, cases reviewed by a court of appeals under Section 21(c) on



the petition of a claimant or an employer already satisfy Article III's case-or-controversy requirement due to the petitioning party's concrete stake in the outcome and the adverse interest of the other private party. In *Newport News*, the Court expressly recognized that an agency's entitlement to participate in the court of appeals as a party respondent is distinct from whether the agency has standing to appeal, observing that, "[o]bviously, an agency's entitlement to party respondent status does not necessarily imply that agency's standing to appeal." 115 S. Ct. at 1284 n.2. Moreover, Section 21(c)'s statutory requirement that a petitioner be "adversely affected or aggrieved" by the Board's ruling does not apply to respondents, who necessarily include parties who prevailed before the Board. The party-respondent question thus is not one of "standing." Standing concerns the right of a litigant to initiate proceedings, while the party-respondent question concerns the Director's right to participate in proceedings that another litigant has already initiated in court.

B. 1. Petitioner's contention (Pet. Br. 33) that there is no authority for the Director to appear as a party respondent in the court of appeals disregards at least two sources of such authority—Section 21a of the LHWCA, 33 U.S.C. 921a, and Rule 15(a) of the Federal Rules of Appellate Procedure. Section 21a states:

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

33 U.S.C. 921a. Clearly, Congress intended that the various entities within the agency at issue here (the Department of Labor) could, in certain circumstances, participate

in "court proceedings under section 921," inasmuch as Congress provided for their legal representation in such cases. Section 921a refers explicitly to the Secretary. As the Secretary's delegate for purposes of the Act, the Director stands in the Secretary's shoes, and the Secretary has specified that the Director, as his delegate, is to be the agency official represented in court in connection with petitions for review under Section 21(c). Moreover, although the LHWCA does not specify who is to appear as a respondent on a petition for review, Section 21(c), 33 U.S.C. 921(c), provides that, upon the filing of the petition for review, notice is to be provided to the Board and to the "other parties," a term that includes the Director, who was a party before the Board. See *McCord v. Benefits Review Bd.*, 514 F.2d 198, 200 (D.C. Cir. 1975).

To be sure, Section 21a could be read to be limited to instances in which the Secretary, through the Director, has standing under Section 21(c) to petition for review, *e.g.* where the Director is adversely affected or aggrieved because the Board's ruling interferes with the Director's duties in administering the special fund under 33 U.S.C. 944(a). But there is no reason to believe that the participation in litigation contemplated by Section 21a is limited to those narrow circumstances.<sup>18</sup>

2. Even absent Section 21a, however, there is clear legal authority for the Director to participate as a party respondent when a court of appeals reviews a ruling by the Board. As petitioner acknowledges, Federal Rule of

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<sup>18</sup> If the Director never has standing to seek judicial review, as petitioner seems to suggest (Pet. Br. 32, 39 (contending Director is not a "person" within the meaning of Section 21(c); but see *Newport News*, 115 S. Ct. at 1284 n.3 (leaving that issue unresolved)), Section 21a would seem necessarily to be based on an understanding by Congress that the Director is authorized to appear as a respondent.

Appellate Procedure 15(a) requires that, "[i]n each case" in which review by the court of appeals of an agency order is sought, "the agency must be named respondent." See Pet. Br. 34-36.<sup>19</sup>

Rule 15(a) defines "agency" to "include[] agency, board, commission, or officer." Fed. R. App. P. 15(a). Rule 15(a) has required that the agency be named as respondent since 1966. See Notes of Advisory Committee on Appellate Rules 1967 Adoption. Before 1966, the courts of appeals provided for agency participation through local rules. See 9 James W. Moore, *Moore's Federal Practice* ¶ 215.01 (1996) (quoting text of so-called uniform rule of Third Circuit); 3 Kenneth C. Davis, *Administrative Law Treatise* 283 n.23 (1958) ("Every volume of reports of federal decisions contains cases in which federal agencies are parties, and no one ever challenges the propriety of this practice.").

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<sup>19</sup> Petitioner argues that Rule 15(a) does not apply because the Director's presence as a party is not necessary "to insure the proper adversarial clash requisite to a 'case or controversy.'" Pet. Br. 35 (citation omitted). But Rule 15(a) on its face imposes no such limitation, and "[t]he existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in many other sorts of review of federal administrative action." *Pittston Stereodoring Corp. v. Dellaventura*, 544 F.2d 35, 43 n.5 (2d Cir. 1976), aff'd on other grounds *sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); see, e.g., *North Dakota ex rel. Lemke v. Chicago & N.W. Ry.*, 257 U.S. 485, 490 (1922) (provision for United States to participate in proceedings to review orders of Interstate Commerce Commission). Sufficient adversity between private parties of course does establish a case or controversy under the LHWCA, see *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 305 (1983), and thereby defeats petitioner's argument (Pet. Br. 38) that allowing the Director's participation under Rule 15(a) would extend an appellate court's jurisdiction contrary to Federal Rule of Appellate Procedure 1(b).

Before 1972, a deputy commissioner was a party in the court of appeals when the agency's determination of a compensation case was under review. That was because Congress provided that a deputy commissioner be the respondent in any district court proceedings challenging the agency's determination of a compensation claim under the LHWCA. 33 U.S.C. 921(b) (1970). The deputy commissioner was subject to appointment and oversight by the Secretary. 33 U.S.C. 939(a) and (b), 940(a) and (b); see also 20 C.F.R. 31.1 (1971). Thus, an action in the district court against a deputy commissioner was effectively an action against the Secretary of Labor.<sup>20</sup> An appeal in such a case was taken to the court of appeals, where the deputy commissioner necessarily continued as a party.

In the 1972 amendments to the LHWCA, Congress assigned adjudicatory responsibilities to administrative law judges and created the Benefits Review Board to perform the review function formerly assigned to district courts. At the same time, Congress authorized the Secretary to appoint the members of the Board to serve at his discretion, 33 U.S.C. 921(b); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 14-15 (1972); see also *Kalaris v. Donovan*, 697 F.2d 376, 391-397 (D.C. Cir.) (Secretary has authority to remove Board members), cert. denied, 462 U.S. 1119 (1983), and retained the Secretary's authority to appoint employees and

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<sup>20</sup> The judicial proceeding under that version of the Act constituted a suit for injunctive relief against the deputy commissioner in district court, with further review by appeal to a court of appeals under 28 U.S.C. 1291. See 33 U.S.C. 921(b) (1970); *Kalaris v. Donovan*, 697 F.2d 376, 382 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). At that time, the deputy commissioners in the Department of Labor both administered the LHWCA and adjudicated cases. See 33 U.S.C. 919 (1970); *Kalaris*, 697 F.2d at 381-382.



administer the LHWCA, see 33 U.S.C. 939(a) and (b), 940(a) and (b).

In adopting this new arrangement in 1972, Congress did not specifically denominate who would be a respondent in court proceedings to review Board decisions in the court of appeals, under Rule 15(a). The 1972 amendments evidenced no intent, however, to change the pre-1972 rule allowing the Secretary to participate, through the deputy commissioner acting (in part) as the administrator of the Act, as a respondent in court proceedings to review final administrative orders awarding or denying compensation. See *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 485 (D.C. Cir. 1982); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 43 n.5 (2d Cir. 1976), aff'd on other grounds *sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

Although petitioner argues (Pet. Br. 37) that the purpose of the 1972 amendments was "to remove the Director from the adjudicative process," it misapplies that principle to this case. Congress sought to separate the administrative and adjudicative functions within the Department of Labor by ensuring that those functions would be performed by separate officials. Thus, ALJs and members of the Board, not the Director, serve as the administrative *judges* who render formal adjudicatory decisions under the Act. Nothing in that arrangement suggests that the administrator (the Secretary, through the Director) could not participate as a *party* before the Board—much less that the Director could not participate as a party-respondent in the court of appeals in Section 21(c) review proceedings. See S. Rep. No. 1125, *supra*, at 15; H.R. Rep. No. 1441, *supra*, at 11, 12-13. See *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d at 42 n.5 (Friendly, J.) ("we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of

federal administrative action in which no one representing the Government would be a party").

Nor did the 1972 amendments demonstrate an intent to require the Board to be named as respondent in proceedings before the courts of appeals. Instead, they gave the Secretary the authority (formerly held by United States Attorneys) to appoint attorneys to represent "the Secretary, the deputy commissioner, or the Board in any court proceedings under section 21 or other provisions of this Act except for proceedings in the Supreme Court of the United States." Pub. L. No. 92-576, § 16, 86 Stat. 1262 (amending 33 U.S.C. 921a); see H.R. Rep. No. 1441, *supra*, at 21-22; S. Rep. No. 1125, *supra*, at 25. See *Ingalls Shipbuilding Div., Litton Sys., Inc. v. White*, 681 F.2d 275, 284 (5th Cir. 1982) (suggesting that the omission of a reference to the proper respondent when Section 21 was amended "was a conscious recognition of the more general reference in Rule 15(a)"), overruled in part on other grounds, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.), cert. denied, 469 U.S. 818 (1984); *Krolick Contracting Corp. v. Benefits Review Bd.*, 558 F.2d 685, 689-690 (3d Cir. 1977) (same); see also *Newport News*, 115 S. Ct. at 1290 (Ginsburg, J., concurring) (observing that committee report accompanying amendments to the Black Lung Benefits Act "strongly indicates that Congress considered vital to sound administration of the [LHWCA] the administrator's access to court review").

Pursuant to that authority in Section 21a, and his authority to delegate his duties under the Act, the Secretary of Labor has long provided that the Director "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA," and is to be represented by attorneys from the Department of Labor,

Office of the Solicitor. 20 C.F.R. 802.410(b); see 42 Fed. Reg. 16,133 (1977) (regulation clarifies who represents "the Department of Labor" in Section 21(c) review proceedings). Thus, the Director has a right to participate as a party respondent because the Secretary of Labor has appropriately designated him as the proper agency respondent under Rule 15(a). The majority of the courts of appeals agree. See, e.g., *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 1080 (9th Cir. 1988); *White*, 681 F.2d at 281-284; see also *Simpson v. Director, OWCP*, 681 F.2d 81, 82 (1st Cir. 1982), cert. denied, 459 U.S. 1127 (1983); *Insurance Co. of North America v. Gee*, 702 F.2d 411, 413 n.2 (2d Cir. 1983); cf. *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 807 n.4 (3d Cir. 1988).

There can be little doubt that the Secretary reasonably identified the Director rather than the Board to represent the Department of Labor as respondent in court of appeals proceedings to review Board decisions. As discussed above, the Secretary has delegated his authority to administer and enforce the LHWCA, and other compensation statutes, to the Director. The Director is accountable for the statute's operation and has broad practical experience of its day-to-day administration in many times the number of cases that are litigated formally. The Director therefore bears a responsibility of ensuring fair and consistent operation of the LHWCA. *White*, 681 F.2d at 284. Moreover, because it is the statutory and regulatory interpretations by the Director, rather than those by the Board, that are entitled to deference by the courts (see note 12, *supra*), it is appropriate for the Director rather than the Board to defend his authoritative positions in the courts. See, e.g., *Cowart*, 505 U.S. at 476-477, 479-481.

In contrast, the Board is solely an adjudicatory body that has no more interest in defending its decisions than

did the district courts that the Board replaced in the LHWCA scheme of review. See *Shahady*, 673 F.2d at 485 n.9 and cases cited; *McCord v. Benefits Review Bd.*, 514 F.2d 198, 200 (D.C. Cir. 1975); see also *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) ("the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts"). Requiring the Board to participate in Section 21(c) reviews as respondent would be inconsistent with the adjudicatory role specified for it under the 1972 amendments, and would burden the Board's time and resources, possibly adding to what historically has been a sizeable case backlog. See, e.g., *McCord*, 514 F.2d at 200 (granting motion to dismiss Board as respondent); H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 34 (1984) (noting Board's backlog); see also *Shahady*, 673 F.2d at 483 n.5 ("The Secretary's regulation is the only sensible construction of the current § 921a in light of this and other courts' holdings that the Board (and a fortiori the deputy commissioner) is an improper respondent.").<sup>21</sup>

This Court indicated some approval of the Secretary's regulation naming the Director rather than the Board as respondent in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The court of appeals in that case had questioned whether the Director was a proper respondent but had not decided whether the Board should have been substituted for the Director. *Id.* at 256 n.11 (citing

<sup>21</sup> To the extent that the Secretary is to be distinguished from the Board for these purposes, Section 39(a) of the LHWCA provides that, "[e]xcept as otherwise specifically provided," the Secretary of Labor shall administer the provisions of the Act. 33 U.S.C. 939(a). Nothing in the Act "specifically provide[s]" for the Board to appear as a respondent in the courts of appeals, and it is therefore within the authority of the Secretary to designate the proper respondent.



*Dellaventura*, 544 F.2d at 42 n.5). The Court also did not decide that issue, because no party had questioned the identity of the federal respondent. *Ibid.*; see also *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 304 n.13 (1983) (open question whether Director is proper party respondent). The Court in *Northeast Marine Terminal* noted, however, that the Secretary's regulation (promulgated after the court of appeals' decision and in response to it, see 42 Fed. Reg. 16,133 (1977)), had "ma[de] it clear that the Director of OWCP is the proper federal party in a case of this nature." 432 U.S. at 256 n.11; accord *Perini North River Assocs.*, 459 U.S. at 304 n.13. By finding the regulation "clear," the Court "appears to have approved [it]." *Shahady*, 673 F.2d at 481.<sup>22</sup>

<sup>22</sup> The Secretary's regulation is also consistent with the practice of other agencies that have internal tribunals established solely to adjudicate cases. For example, although the Board of Immigration Appeals renders adjudicatory decisions under the Immigration and Nationality Act, see 8 C.F.R. 3.1 (establishment of Board), the Immigration and Naturalization Service normally constitutes the "agency" respondent on petitions for review in the courts of appeals. See, e.g., *Stone v. INS*, 115 S. Ct. 1537 (1995). Similarly, an Appeals Council issues final decisions under the Social Security Act, see 20 C.F.R. 404.981, but district court actions are brought against the Commissioner of Social Security (formerly the Secretary of Health and Human Services). See 42 U.S.C. 405(g); 20 C.F.R. 422.210(d). See also 28 U.S.C. 2341(3)(D) (defining "agency" to mean Secretary for orders issued under Section 812 of Fair Housing Act); 42 U.S.C. 3612(h) (Section 812(h) of Fair Housing Act, providing that ALJ orders are final if Secretary decides not to review them); *Radin v. United States*, 699 F.2d 681, 686 (4th Cir. 1983) (National Railroad Adjustment Board and its components are not proper parties in action to challenge award under Railway Labor Act, 45 U.S.C. 153). Even where Congress has established an independent agency to adjudicate disputes (unlike the Benefits Review Board, which is within the Department of Labor, consists of members appointed by the Secretary, and operates under procedures promulgated by the Secretary), most (but not all) courts have held that the

## CONCLUSION

The judgment of the court of appeals should be affirmed.  
Respectfully submitted.

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adjudicatory tribunal is not a proper party on appeal. See *Oil, Chem. & Atomic Workers Int'l Union v. OSHRC*, 671 F.2d 643, 651-652 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982), and cases cited.

## APPENDIX

Section 33 of the Longshore and Harbor Workers' Compensation Act, as amended and codified at 33 U.S.C. 933, provides:

**§ 933. Compensation for injuries where third persons are liable**

**(a) Election of remedies**

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

**(b) Acceptance of compensation operating as assignment**

Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.



**(c) Payment into section 944 fund operating as assignment**

The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

**(d) Institution of proceedings or compromise by assignee**

Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

**(e) Recoveries by assignee**

Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

**(1) The employer shall retain an amount equal to—**

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed

and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

**(f) Institution of proceedings by person entitled to compensation**

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

**(g) Compromise obtained by person entitled to compensation**

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is

executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

(4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

**(h) Subrogation**

Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

**(i) Right to compensation as exclusive remedy**

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.



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## QUESTIONS PRESENTED

1. Is the wife (a "potential" widow) of an injured worker a "person entitled to compensation" under § 33(g) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") when she enters into third party tort settlements during the lifetime of her husband?

2. Does the Director of the Office of Workers' Compensation Programs have standing to respond to a Petition For Review of a Benefits Review Board decision pursuant to Fed.R.App.P. 15(a)?



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### STATUTES INVOLVED

This case involves the interpretation of 33 U.S.C. § 933(g), the Longshore and Harbor Workers' Compensation Act. As reflected in the opinion of the Fifth Circuit Court of Appeals, 33 U.S.C. § 933(f) was not invoked with respect to the pre-death settlements that are involved in this Appeal.

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### STATEMENT OF THE CASE

For ease of reference, the Petitioners will be referred to as "Ingalls" or the "Petitioners". The Claimant-Respondent will be referred to as "Maggie Yates", "Mrs. Yates", or the "Respondent". The Respondent, Director of the Office of Workers' Compensation Programs, will be referred to as the "Director". The Administrative Law Judge and the Benefits Review Board will be referred to as the "ALJ" and the "BRB" or the "Board", respectively. Pursuant to Sup.Ct.R. 24.1(g), references to the Petitioners' Appendix submitted with the Petition For Writ of Certiorari will be by the designation (Pet. App.), and references to the Respondent's Appendix in the opposing brief will be by the designation (Resp. App.). References to other portions of the record will be by the designation (R.), and references to testimony before the ALJ will be by the designation (Tr.). Joint exhibits and the Employer's exhibits will be referred to as (JX) and (Emp. Exh.), respectively.

Jefferson and Maggie Yates married in 1931 when Mrs. Yates was twenty-three years old. (Tr. 22-23). For approximately thirty years, they lived in George County,



Mississippi. (Tr. 22). Mr. Yates worked for Ingalls as a shipfitter beginning in 1953. He ended his employment with Ingalls in September, 1967. Mr. Yates worked in other jobs until he voluntarily retired in 1974 at the age of sixty-seven. (R. 246).

On March 23, 1981, Mr. Yates was evaluated for asbestos-related diseases. On April 16, 1981, Mr. Yates filed a claim for disability benefits against Ingalls under the Longshore and Harbor Workers' Compensation Act (the "LHWCA" or the "Act"). (R. 246; Pet. App. 61). On May 26, 1981, he filed a third-party tort action in the United States District Court for the Southern District of Mississippi, Southern Division, seeking damages against the manufacturers and sellers of asbestos products to which he was exposed while employed at Ingalls. (R. 247; Tr. 30; Pet. App. 61). Mrs. Yates was not a plaintiff in the third-party action. (Pet. App. 61).

Mr. Yates was diagnosed with asbestosis on April 17, 1981. He died on January 28, 1986. His death was caused in part by his asbestos exposure. (Pet. App. 59). On April 22, 1986, Maggie Yates, Mr. Yates' widow, filed a claim for death benefits under § 9 of the LHWCA. 33 U.S.C. § 909; (Pet. App. 63). At the time of Mr. Yates' death, none of Mr. Yates' six (6) children were minors or dependent on Mr. Yates. None of the children filed claims for death benefits under the LHWCA. (R. 246; Tr. 37; Pet. App. 60, 63).

Before his death, Mr. Yates agreed to settlements with eight third-party defendants (the "pre-death settlements"). Mrs. Yates joined in the settlements, which were made without obtaining Ingalls' prior written approval.

(R. 247; Pet. App. 62-63). Releases were signed which released the third-party defendants from liability arising from Mr. Yates' exposure to asbestos. Some of the earlier third-party settlements limited the Mrs. Yates' release to loss of consortium. (R. 248; Pet. App. 63). Other settlements used language to foreclose Mrs. Yates from bringing any future tort claim for the wrongful death of Mr. Yates. (R. 248; Pet. App. 63). None of the pre-death settlements foreclosed Ingalls from bringing its own claim under *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371 (1969). (R. 248; Pet. App. 63).

Mr. Yates' LHWCA claim for disability benefits under § 8 of the Act was filed before his death, and settled pursuant to § 8(i) of the Act on May 5, 1983 for a lump sum payment of \$15,000.00, open medical benefits, and an award of attorney's fees. (R. 245, 247; Pet. App. 62). The medical benefits referenced in this settlement amounted to \$454.15. Therefore, Ingalls' total liability for compensation and medical benefits to Mr. Yates was \$15,454.15. Hence, Ingalls' lien in the third-party suit was \$15,454.15. Ingalls had notice of the pre-death settlements, and asserted its lien. Ingalls recouped its compensation lien of \$15,454.15 in full. (R. 253; Pet. App. 62-63).

On January 28, 1986, Mr. Yates died from prostate cancer. The parties stipulated that Mr. Yates' asbestosis contributed to his death. (JX-1; Pet. App. 58-59). On April 22, 1986, Mrs. Yates filed a claim for death benefits under § 9 of the LHWCA. (Pet. App. 63). Ingalls controverted Mrs. Yates' claim for death benefits, arguing that the claim was barred by the forfeiture provisions of 33 U.S.C. § 933(g)(1) and (2) because Mrs. Yates failed to obtain the

written approval of Ingalls for the third-party settlements entered into before Mr. Yates' death. (Pet. App. 59-60).

A formal hearing was held before an administrative law judge on June 7, 1991, at which Maggie Yates, then eighty-three (83) years old, testified. (Tr. 22-23). The ALJ found that Mrs. Yates' death claim was not barred by § 33(g), because she was not a "person entitled to compensation" at the time of the pre-death settlements. (Pet. App. 65-72). Ingalls prosecuted an appeal to the BRB. The BRB affirmed the ALJ's ruling on § 33(g), since Mrs. Yates was not a "person entitled to compensation" at the time of the pre-death settlements. (Pet. App. 24-37). Ingalls then appealed to the United States Court of Appeals for the Fifth Circuit. On October 3, 1995, the Fifth Circuit affirmed the BRB, and held that Mrs. Yates was not a "person entitled to compensation" within the meaning of § 33(g) at the time of the pre-death settlements. (Pet. App. 6-11); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 463-64 (5th Cir. 1995). Ingalls' suggestion for rehearing *en banc* was denied by the Fifth Circuit on November 22, 1995. (Pet. App. 18-19).

This Court granted certiorari to review the Fifth Circuit's decision with respect to § 33(g) of the LHWCA and the standing of the Director to respond to a petition for review of the BRB decision.

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#### SUMMARY OF THE ARGUMENT

Maggie Yates' LHWCA claim was for death benefits under § 9 of the Act. A dependent's claim for death

benefits is separate and distinct from a claim for disability benefits by an injured worker on whom the death claimant is dependent. A dependent's claim for death benefits does not accrue until the death of the worker to whom the death claimant is married or a dependent. Hence, a claim for death benefits cannot vest until the death of the injured worker-spouse on whom the claimant is dependent. Under *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992), an LHWCA claimant becomes a "person entitled to compensation" at the moment his right to recovery vests. And, for purposes of forfeiture under § 33(g)(1), the outcome-determinative issue is whether the claimant is a "person entitled to compensation", and more precisely, whether the claimant was such a person at the time of the third-party settlement. The status of "person entitled to compensation" is conferred by § 33(g) and *Cowart* only if the claimant has satisfied the prerequisites attached to the right to compensation. In other words, the forfeiture provisions of § 33(g)(1) and (2) apply only if the claimant makes an unapproved third-party settlement when the claimant has qualified for, and has an entitlement to, the right or benefit under the LHWCA.

When Mrs. Yates entered into the third-party tort settlements before Mr. Yates' death, she was not a "person entitled to compensation". At the time of the pre-death settlements, it was Mr. Yates – not Mrs. Yates – who was the "person entitled to compensation" within the meaning of § 33(g)(1). Mrs. Yates' claim for death benefits accrued, and therefore vested, on January 28, 1986, when Mr. Yates died.



The plain language of § 33 of the LHWCA, as interpreted by this Court in *Cowart*, controls the issue. As in *Cowart*, the Court may not judicially rewrite the statute on the Petitioners' plea that, as an abstract matter, their argument is "good policy". *Cowart* teaches that "the beginning point must be the language of the statute", and "when a statute speaks with clarity to an issue. . . . courts must give effect to the clear meaning of statutes as written". *Cowart*, 112 S.Ct. at 2594.

The Fifth Circuit correctly held that the Director is a proper respondent under Fed.R.App. 15(a), which expressly requires a party seeking review of an agency order to name the agency as a respondent. The Secretary of Labor has the authority to appoint counsel to represent him "in any court proceedings under § 921". 33 U.S.C. § 921(a). Pursuant to that authority, the Secretary of Labor has named the Director of OWCP as his designee responsible for enforcing the LHWCA, and as the proper party to appear on behalf of the Secretary in all review proceedings. Because the Director's views are entitled to deference, it would be an anomaly to preclude the Director from expressing those views in court as a respondent on issues of national import.

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## ARGUMENT

### 1. IS THE WIFE (A "POTENTIAL" WIDOW) OF AN INJURED WORKER A "PERSON ENTITLED TO COMPENSATION" UNDER § 33(g) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT ("LHWCA") WHEN SHE ENTERS INTO THIRD-PARTY SETTLEMENTS DURING THE LIFETIME OF HER HUSBAND?

The Petitioners argue that by settling her potential third-party claims for the wrongful death of her husband during her husband's lifetime, Mrs. Yates' LHWCA claim for death benefits, which accrued only at the time of her husband's death, is barred by the forfeiture provisions of § 33(g). Put another way, the Petitioners argue that Mrs. Yates was a "person entitled to compensation" at the time of the pre-death settlements. The Petitioners' argument is contrary to logic, and most importantly, contrary to the express language of the statute as interpreted by this Court in *Cowart*.

#### a. The Outcome-Determinative Issue Under § 33(g) And *Cowart* Is Whether Maggie Yates Was A "Person Entitled To Compensation" At The Time Of The Pre-Death Settlements, And Logic And Law Dictate That She Was Not A "Person Entitled To Compensation" At That Time.

Consideration of the issue of forfeiture under § 33(g) begins with the language of the statute itself, and the Court's interpretation of the statute in *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992). As *Cowart* teaches, "the beginning point must be the language of the statute. . . . When a statute speaks

with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. . . . The controlling principle. . . . is the basic. . . . rule that courts must give effect to the clear meaning of statutes as written". *Id.*, at 2594.

Section 33(g)(1) provides:

*"Compromise Obtained By Person Entitled To Compensation". (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into." (emphasis added).*

Section 33(g)(2) provides that all rights to compensation and medical benefits under the Act shall be terminated if no written approval of the settlement is obtained as required by § 33(g)(1). The written approval must be obtained by the "person entitled to compensation" who enters into a settlement with a third-party for an amount less than the compensation to which that person is entitled. (emphasis added).

In *Cowart*, the claimant suffered a scheduled injury to the hand on July 29, 1983. The LHWCA employer and carrier paid the Claimant temporary disability payments for ten (10) months following the injury. However, the employer and carrier failed to make additional compensation payments for permanent partial disability, although the Department of Labor notified the carrier that Cowart was owed permanent partial disability compensation. Cowart filed a third-party tort action against Transco Exploration Company ("Transco"), which he settled on July 1, 1995. Ironically, the third-party settlement was funded entirely by the employer under an indemnification agreement with Transco, the third-party sued by Cowart. However, Cowart did not obtain written prior approval from the employer under § 33(g)(1). Cowart then filed a claim for LHWCA benefits. The employer defended the LHWCA claim on the ground that Cowart had forfeited his compensation benefits under § 33(g)(2) by failing to obtain prior written approval required by § 33(g)(1). This Court held that the outcome-determinative issue was whether Cowart was a "person entitled to compensation" under § 33(g)(1), and more precisely, whether Cowart was such a person at the time of the third-party settlement. This Court specifically held:

*"The question is whether Cowart, at the time of the Transco settlement, was a 'person entitled to compensation' under the terms of § 33(g)(1) of the LHWCA". Id., at 2594. (emphasis added).*

This Court observed that "both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies", and it meant only that "the person satisfies the prerequisites attached



to the right". *Id.*, at 2595. Hence, the claimant "became a person entitled to compensation *at the moment his right to recovery vested*, not when his employer admitted liability. . . .". *Id.* (emphasis added). Cowart's LHWCA claim vested at the time of his traumatic work-related injury. Cowart became a "person entitled to compensation" at the time of his injury, and he was paid temporary disability payments after the injury. Section 33(g)(1) applies only where the "person entitled to compensation enters into a settlement" with a third-party. The forfeiture provision of 33(g)(1) and (2) is not triggered or implicated unless the claimant so qualifies at the time of the settlement.

The critical time, therefore, for measuring "person entitled to compensation" status is the time at which the LHWCA claimant *enters* into a settlement with a third person. (emphasis added). "Congress' use of a verb tense is significant in construing statutes". *United States v. Wilson*, 503 U.S. 329, 112 S.Ct. 1351, 1354, 117 L.Ed.2d 593 (1992). Cowart's interpretation of § 33(g) and the use of the present tense of "enters" in the statute undercuts the Petitioners' argument that a spouse such as Mrs. Yates is barred by § 33(g)(1) from receiving death benefits under the Act "whether the unapproved settlements occurred before or after the husband's death". (Pet. Brief 7). Section 33(g)(1) does not apply to the situation in which a person with an unmaturing "potential" claim, and therefore with no claim, enters into a third-party settlement.

By any measure of law and logic, Mrs. Yates was not a "person entitled to compensation" at the time of the pre-death settlements. It was Mr. Yates, and not Mrs. Yates, who was the "person entitled to compensation" at

the time of the pre-death settlements, because only he had a matured and vested claim for compensation under the LHWCA at the time of the pre-death settlements. Before the death of her husband, Mrs. Yates was not entitled to the specific right or benefit involved here – death benefits under § 9 of the LHWCA. Put another way, at the time of the pre-death settlements, Mrs. Yates did not "satisfy the prerequisites attached to the right" to death benefits under the LHWCA.

Did Mrs. Yates qualify for a death benefit under the LHWCA at the time of the pre-death settlements? The ALJ, the BRB, and the Fifth Circuit correctly answered, no, because Mrs. Yates' "right to death benefits under the Act could not have vested *before* she became a widow". (Pet. App. 35) (BRB's emphasis). As observed by the Fifth Circuit, there were three contingencies under which Mrs. Yates' "potential" claim for death benefits under the LHWCA would have never accrued. "She could have predeceased or divorced her husband, or Jefferson Yates could have died from causes unrelated to his employment". *Ingalls Shipbuilding, Inc. v. Director, OWCP*, *supra*, at 464; (Pet. App. 10-11, 35). Upon the happening of any of the three contingencies, Mrs. Yates' claim for death benefits never would have accrued. Yet, the Petitioners' attempt to visit the harsh consequences of § 33(g) forfeiture on Mrs. Yates and other dependents of deceased LHWCA workers by arguing that Mrs. Yates had a "potential" death claim which "vested" at the time of her husband's injury. (Pet. Brief 21). Arguing language from the Ninth Circuit in *Force v. Director OWPC*, 938 F.2d 981 (9th Cir. 1991), the Petitioners urge that "a claimant's

status as a 'person entitled to compensation' need not be fixed at any particular moment". (Pet. Brief 17).

It is here that we must point out the nature of Maggie Yates' claim. Her claim was one for death benefits under § 9 of the Act, as opposed to one for disability benefits made by Mr. Yates during his lifetime. 33 U.S.C. § 908 (disability claims); 33 U.S.C. § 909 (death claims). The Petitioners' argument that a "potential widow's claim" vests before her husband's death belies any real understanding of the difference between a claim for disability benefits and a claim for death benefits, and is contrary to well settled case law which notes the distinctions between the two types of claims under the Act.

**b. The Petitioners' Argument That A "Potential Widow's" Claim For Death Benefits Vests Before Her Husband's Death Belies Any Real Understanding Of The Difference Between A Claim For Disability Benefits And A Claim For Death Benefits, And Is Contrary To Longstanding Case Law Drawing The Distinctions Between The Two Types Of Claims Under The LHWCA.**

The Petitioners have argued to the Court that "a potential widow's claim vests at the time of her husband's injury as opposed to the time of his death". (Pet. Cert. 14). This argument is continued in one form or another in the Petitioners' Brief On The Merits, and is represented by the following statements:

"Since Mrs. Yates' status as a dependent widow was established as of the time of her husband's injury, her § 33(g) approval obligations were

also established at the time of his injury". (Pet. Brief 21).

"Mrs. Yates was just as entitled to receive compensation under the LHWCA as she was entitled to recover for her husband's wrongful death when she entered into the unapproved settlements during his lifetime". (Pet. Brief 22).

". . . . because she (Mrs. Yates) became vested with the LHWCA's protections and benefits once her husband was injured at work, she was a 'person entitled to compensation' . . . ." (Pet. Brief 23).

". . . . where an employee is injured at work in such a way that the injury *may lead* to the employee's death, the fact that the spouse of the employee is not yet receiving compensation while the employee is alive does not mean that she loses her status as a 'person entitled to compensation' ". (Pet. Brief 26-27). (emphasis added).

Mrs. Yates did not advance the same claim for benefits under the LHWCA as her husband. During his lifetime, Mr. Yates asserted a claim for disability benefits under § 8 of the Act to which Mrs. Yates was not a party. After Mr. Yates' death, Mrs. Yates filed a separate and distinct claim – a claim for death benefits as a dependent widow. Under the Petitioners' "mix and match" approach, the Petitioners blur the distinction between an accrued, and therefore vested, claim for disability benefits by an injured worker during his lifetime, and a claim for death benefits by a dependent of that worker which arises, if at all, only when the worker dies and the death is causally related to the employment.



Mrs. Yates could not have invoked the administrative machinery of the LHWCA to pursue a death claim while Mr. Yates was living. While Mr. Yates was living, Mrs. Yates had no claim or entitlement to benefits under the LHWCA. One could imagine what Ingalls would have said had Mrs. Yates asserted or filed a claim for death benefits under § 9 of the Act while Mr. Yates was living. Had Mrs. Yates made a claim for death benefits while Mr. Yates was living, there would have been a clear invitation for Ingalls to argue, quite properly, that the death claim had been "instituted or continued without reasonable grounds", and that costs should be assessed against Mrs. Yates. 33 U.S.C. § 926.

A claim for death benefits arises only upon the death of a worker covered by the LHWCA to whom the claimant was married or dependent. *I.N.A. v. Dept. of Labor*, 969 F.2d 1400, 1405-06 (2nd Cir. 1992) (right to death benefits a separate claim which did not accrue until death); *Shea v. Director, OWCP*, 929 F.2d 736, 739 (D.C. Cir. 1991); *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 779, 784-86 (5th Cir. 1988) (right to death benefits may not be settled before it arises, i.e., before the death of the injured worker); *Henry v. George Hyman Const. Co.*, 749 F.2d 65, 73-74 (D.C. Cir. 1984) ("when death occurs, a new cause of action arises"); *Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 846 (5th Cir. 1981) ("cause of action for death benefits certainly does not arise until death"); *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 902 (9th Cir. 1979) (injured workers' deaths give rise to new claims for relief not in existence during their lifetimes; when they died. . . . their survivors' rights to death benefits first vested. . . ."); *St.*

*Louis Ship Building and Steel Co. v. Casteel*, 583 F.2d 876, 877 (8th Cir. 1978) ("liability for death benefits comes into existence only upon the event of death and is therefore independent of the liability for disability benefits occasioned by the earlier injury"); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, 853 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("right to death benefits does not vest until the time of death"); *State Insurance Fund v. Pesce*, 548 F.2d 1112, 1114 (2nd Cir. 1977) ("right to death benefits separate and distinct from right to disability benefits, and does not come into being until death"); *Norfolk, Baltimore and Carolina Lines, Inc. v. Director, OWCP*, 539 F.2d 378, 380 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977) (death claim does not exist during decedent's lifetime, and does not become vested until death); *Hampton Road's Stevedoring Corp. v. O'Hearne*, 184 F.2d 76, 79 (4th Cir. 1950); *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 664 (2nd Cir. 1938), *cert. denied*, 304 U.S. 565 (1938).

In short, claims for disability benefits under § 8 and for death benefits under § 9 are separate and distinct, having different claimants, and accruing on different bases. *Id.*; *Alabama Dry Dock and Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 1560-61 (11th Cir. 1986). The conceptual difference between the two types of claims under the Act eliminates any notion of "double recovery" if a claimant such as Maggie Yates receives a death benefit after her deceased husband received a disability benefit during his lifetime. *Henry v. George Hyman Const.*, *supra*, at 74. LHWCA regulations also underscore the distinction between the disability claim of an injured worker and the death claim of his survivors. An injured employee can settle his right to compensation or medical

benefits, but not his survivors' right to death benefits. 20 C.F.R. § 702.241(g) (agreement to settle claim is limited to rights of the parties and to claims then in existence; settlement of disability compensation or medical benefits shall not be settlement of survivor benefits nor affect survivors' right to file claim for survivors' benefits). The spouse of an injured worker is not a party to the injured worker's disability claim. During the injured worker's lifetime, his or her spouse has no right to file a claim for death benefits. "It is not until death occurs that the right to benefits (death benefits) arises and the potential beneficiaries are identified". *Cortner v. Chevron Intern. Oil Company, Inc.*, 22 B.R.B.S. 218, 220 (1989).

There is a certain symmetry here in the maritime field. The maritime wrongful death claim of dependent survivors is separate and distinct from the decedent's personal injury claim during his lifetime. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 818, 39 L.Ed.2d 9 (1974), *aff'g*, 463 F.2d 1331, 1332 (5th Cir. 1972).

The Petitioners suggest a "patent asymmetry" in the law because, it is said, "critical aspects of a potential death claim vest at the time of the worker's injury". (Pet. Brief 21-22). The patent asymmetry in this case is the Petitioners' argument that a dependent widow is a "person entitled to compensation" before she has *any* entitlement under the LHWCA – before her husband dies. The Petitioners argue that § 33(g) applied to Mrs. Yates at the time of her husband's injury "since Mrs. Yates' status as a dependent widow was established as of the time of her husband's injury". (Pet. Brief 21) (emphasis added). Logically and factually, how could Mrs. Yates' "status as a dependent widow" be established as of the time of her

husband's injury, obviously, before she became a widow? And what about the other two contingencies noted by the ALJ, the BRB, and the Fifth Circuit – a divorce from her husband or her husband's death from causes unrelated to his employment? The answer is obvious. Not even the most prescient person could predict the outcome of those contingencies at the time of Mr. Yates' injury. If the Petitioners' argument is carried to its logical conclusion, what about § 14 penalties and interest? Does the employer owe a death claimant penalties and interest before her injured spouse dies, or in other words, before the death claimant even has a claim (an "entitlement") that can be asserted for death benefits?

The Petitioners' argument that the "critical aspects of a potential death claim vest at the time of a worker's injury" and that a "widow's claim for compensation benefits is derivative of the initial injury" is a disingenuous attempt to tiptoe around *Cowart* and the language of § 33(g). Obviously, there is a connection between a deceased worker's original injury and a death claim, because the 1984 Amendment to § 9 of the Act provides a death benefit only if the employment injury causes the employee's death. *Shea v. Director, OWCP, supra*, at 737. However, here the focus is whether Mrs. Yates was a "person entitled to compensation" at the time of the pre-death settlements, and therefore, whether her claim for death benefits had vested at the time of the pre-death settlements. Put another way, did Maggie Yates qualify for a death benefit at the time of the pre-death settlements? The ALJ, the BRB, and the Fifth Circuit correctly



answered, no, because Maggie Yates' "right to death benefits under the Act could not have vested *before* she became a widow". (Pet. App. 35) (BRB's emphasis).

**c. *Cretan v. Bethlehem Steel Corp.* Fundamentally Ignores The Critical Distinction Between A "Person Entitled To Compensation" And A Person Potentially Entitled To Compensation Drawn In *Cowart* And By § 33(g)(1).**

The Petitioners argue that the § 33(g) issue is controlled by *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2705, 129 L.Ed.2d 833 (1994) and *Force v. Director OWCP*, 938 F.2d 981 (9th Cir. 1991), on which *Cretan* relies. (Pet. Brief 8, 16-20, 25). First, *Force* is a pre-*Cowart* decision. Its premise, and therefore the premise of *Cretan*, is that "a claimant's status as a 'person entitled to compensation' need not be fixed at any particular moment" for purposes of § 33(f) or (g). (Pet. Brief 17); *Force v. Director OWCP*, *supra*, at 984-85; *Cretan v. Bethlehem Steel Corp.*, *supra*, at 846. The Ninth Circuit held in *Cretan* that "entitlement does not have to become vested at the time the settlement is made". Therefore, reasoned the Ninth Circuit, the dependent wife and child of a disabled worker forfeit their rights to LHWCA death benefits by entering into third-party settlements while the injured worker is alive, even before the wife and dependent child could invoke the Act to claim death benefits and even before there was any entitlement to death benefits.

*Cretan* is hopelessly in conflict with *Cowart*. *Cowart* specifically held that the outcome-determinative issue

was whether the claimant was a "person entitled to compensation" at the time of the third-party settlement.

"The question is whether *Cowart*, at the time of the *Transco* settlement was a 'person entitled to compensation' under the terms of § 33(g)(1) of the LHWCA". *Cowart*, 112 S.Ct. at 2594. (emphasis added).

Even *Cretan* recognizes that the definition of "entitlement" in *Cowart* supports a conclusion opposite to the conclusion the Ninth Circuit reached. *Cretan*, *supra* at 847. The Ninth Circuit in *Cretan* considered this Court's language in *Cowart* that the employee "became a person entitled to compensation at the moment his right to recovery vested" as dicta that was not binding on the Ninth Circuit. As observed by the Fifth Circuit, "the precise issue presented in *Cowart* was the definition of 'a person entitled to compensation'. The Court's determination that the employee qualified under this statutory test when his right to recovery vested is the core of the Supreme Court's holding". *Ingalls Shipbuilding, Inc. v. Director OWCP*, *supra* at 464.

*Cowart's* discussion of the statutory phrase "person entitled to compensation", of which both *Cretan* and *Ingalls* are so dismissive, is far from "isolated language" or "dicta". The Court's analysis in *Cowart* was central to the discussion of § 33(g)(1) and (2). The Court's analysis of the meaning of "entitled" was necessary only because the statute required that *Cowart* have been "entitled to compensation" at the time of the third-party tort settlement. (emphasis added).

"Explicit rulings on issues that were before the higher court. . . . are not dicta". *Cole Energy Dev. Co. v. Ingersoll Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993); *Harris v. Sentry Title Co.*, 806 F.2d 1278, 1280 (5th Cir. 1987). "Dic-tum" describes comments relevant, but not essential, to disposition of legal questions pending before a court. *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856, 861 (1st Cir. 1993). The Court's discussion in *Cowart* of the meaning of "person entitled to compensation" can hardly be considered dicta on the construction of § 33(g).

A "potential widow" cannot be expected to be prescient about the possibility of an LHWCA claim for death benefits down the road. As pointed out by the ALJ, "the death must be related to the work injury in order for the widow to have a claim. . . . until her husband's death, claimant could not relate his job-related disability to his death". (R. 251). Moreover, Mrs. Yates "could not have known ahead of time that she would outlive her husband, or that she would still be his wife at the time of his death". Thus, in the event of divorce, death before her husband, or Mr. Yates' death from causes other than his employment-related asbestosis, Mrs. Yates' right to death benefits under the Act would never have accrued.

*Cretan's* reliance on "policy considerations" is misplaced. This Court in *Cowart* refrained from judicially amending the plain statutory language of § 33(g) and deciding the case on "policy" grounds. The Court recognized that its ruling would work a harsh result on

workers and would, at the same time, arm employers with a powerful defense. The Court stated:

"We do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary. It also provides a powerful tool to employers who resist liability under the Act. . . . But Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness". *Cowart, supra*, at 2598.

We note that the Court referred to "families" of workers, which reinforces that the Court's interpretation of the phrase "person entitled to compensation" was not "dicta" or "isolated language" having no relevance to a widow's death claim, as found by the Ninth Circuit in *Cretan*. Indeed, the Court noted that the employer and carrier in *Cowart*, through counsel, funded the very third-party settlement which was used to avoid the employer's liability under the LHWCA. *Id.* The Court and experienced practitioners recognize that the employer and carrier can refuse to pay LHWCA benefits to a claimant, and can at the same time literally serve as the "tail that wags the dog" if the claimant pursues a third-party recovery. Roberts, "The LHWCA Lien - The Tail That Wags The Dog", 1993 *Southeastern Admiralty Law Institute*. But, policy considerations cannot override the plain language of the statute, as the Court has observed. And, when the shoe is on the other foot - where *Cowart's* definition of



"person entitled to compensation" is precise and outcome-determinative in favor of the claimant as here – no "policy considerations" can override the statute.

*Cretan* dismisses *Cowart* and the plain language of the statute on grounds of a "central policy of employer protection that is evident on the face of sections 33(f) and (g)" and a policy against "double recovery". *Cretan, supra*, at 847. The Ninth Circuit expressed a fear that death claimants could manipulate tort settlements to frustrate these "policy considerations". These arguments, essentially made again in this case to fend off applying *Cowart* to Mrs. Yates' claim, are addressed to the wrong branch of government. If the situation presented here, an LHWCA death claimant making third-party settlements when she is not a "person entitled to compensation", is a "loophole", then Congress can amend the statute. A judicial amendment of the statute is not warranted. *Cowart, supra*, at 2598.

The Petitioners argue that the Fifth Circuit's interpretation of *Cowart* and the term "person entitled to compensation" defeats the employer's right of offset under § 33(f), and that identical terms ("person entitled to compensation") within an act should bear the same meaning. The Respondent agrees that the phrase "person entitled to compensation" should be given the same meaning for purposes of § 33(f) and (g). But the point is, the Court cannot act on "policy considerations", borne out of notions of "equity" or "fairness", in order to "protect employers against double recovery" (Pet. Brief 25), by contradicting the plain language of the statute. *Cretan's* interpretation of *Cowart* based on "policy considerations" is a judicial rewriting of the statute to suit such

perceived notions. The plain language of § 33 of the Act and this Court's decision in *Cowart* do not grant the Ninth Circuit leave to "stride the quarter-deck of. . . jurisprudence and. . . dispense. . . that which equity and good conscience impels" as a Chancellor. *Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co.*, 303 F.2d 692, 699 (5th Cir. 1962), *cert. denied*, 371 U.S. 942 (1962). *Cretan* dismisses the import of *Cowart*, and also its own precedent in *Todd Shipyards Corp. v. Witthuhn, supra*, which unambiguously states that a survivor's right to death benefits vests when the injured worker dies. *Id.*, at 902. (emphasis added).

Congress has not provided a remedy for every possible circumstance under the Act, and in some cases, there is no remedy. The Act provides no remedy for an employer to recover overpayments from a medical care provider. *Petroleum Helicopters, Inc. v. Nancy T. Garrett, L.P.T.*, 23 F.3d 107, 108 (5th Cir. 1994). A court cannot "fill the gap" perceived by the employer by contradicting the plain language of the statute. *Id.*, at 108-09. And what of an overpayment of compensation to the employee when no future compensation is due? The employer has no separate claim against the employee. The employer's only remedy is to offset overpayments against future compensation installments, if any future installments are due. *Id.*, at 109-10; *Lennon v. Waterfront Transport*, 20 F.3d 658, 661 (5th Cir. 1994); *Vincent v. Consolidated Operating Co.*, 17 F.3d 782, 786 (5th Cir. 1994) (fn. 12); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1205-07 (5th Cir. 1992).

Congress did not provide protection for "potential" employer credits, because the language of the statute only concerns present, vested rights. Section 33 is

designed to protect persons presently entitled to compensation. Section 33(a) permits a "person entitled to compensation" to receive compensation under the Act and also recover damages against a third party, without an election. Section 33(b) provides that "acceptance of compensation under an award in a compensation order" operates as an assignment of the third-party rights of the "person entitled to compensation", if the claimant does not bring an action against the third party within six (6) months after acceptance of compensation. This automatic assignment of the claimant's right to sue a third party reverts back to the "person entitled to compensation" if the employer fails to bring an action against the third party within ninety (90) days after the cause of action is assigned. Section 33(b) specifically defines an award as a "formal order" issued by the Deputy Commissioner, an ALJ, or the BRB.

Section 33(e) spells out the distribution of a third-party recovery when the employer successfully pursues a third party claim pursuant to the automatic assignment. Section 33(f) refers again to the "person entitled to compensation", and provides for a credit to the employer from a third-party recovery "if the 'person entitled to compensation' institutes proceedings *within the period prescribed in § 33(b)*. (emphasis added). In other words, § 33(f) relates back to § 33(b), and therefore refers to *present* rights to LHWCA compensation. (emphasis added). Section 33(g) likewise refers to a "person entitled to compensation", as defined in *Cowart*. Hence, the statute deals only with present rights to compensation. Fairly read, the statute enacted by Congress limits employer

protections to rights that are presently accrued. The Petitioners' plaintive policy arguments concerning § 33(f) offsets, and § 33(g), are addressed to the wrong branch of government. The proper audience is Congress, rather than the Court.

An instructive example is *United Brands Co. v. Melson*, 594 F.2d 1068 (5th Cir. 1979). There, Melson filed a claim for workers' compensation benefits against one employer under the Louisiana Workmen's Compensation Act, and followed it almost fifteen months later with an LHWCA claim under the LHWCA employer. Melson then settled his state compensation claim one month after filing the LHWCA claim. The LHWCA employer argued that it was entitled to credit for the amount recovered by Melson in his state compensation claim. The employer argued that failure to permit it credit for the state compensation award allowed the claimant a "double recovery". *Id.*, at 1074.

The Fifth Circuit assumed that the claimant had obtained a "double recovery", but observed that the LHWCA in 1979 contained only two provisions for a set-off, § 14(k) permitting reimbursement of advance payments of compensation from future compensation installments and § 33. At the time, the LHWCA had no provision allowing an employer credit for recoveries from a state compensation claim. Although the court believed that the claimant had obtained a "double recovery", the Fifth Circuit properly deferred to the legislative branch.

"Until Congress is moved by this unusual situation, we think that the solution to this difficult problem is to allow the windfall of double recovery to reside with the injured worker



rather than allow the set-off windfall to accrue to United Brands". *Id.*, at 1075.

And, in 1984, Congress remedied this perceived inequity by permitting an LHWCA employer a credit for benefits paid to the claimant pursuant to another workers' compensation law. 33 U.S.C. § 903(e). *Cretan* is not "controlling" because it ignores the critical distinction drawn by *Cowart* and the statute between a "person entitled to compensation" and a person potentially entitled to compensation. Section 33(g)(1) of the Act plainly makes that distinction. It is the Petitioners that are attempting to "engraft an exception" into § 33 (Pet. Brief 9), not the Respondent.

The Petitioners urge that Mrs. Yates extinguished Ingalls' subrogation rights against the third-party defendants by entering into the pre-death settlements. (Pet. Brief 14). None of the pre-death settlements foreclosed Ingalls from bringing its own claim for reimbursement under *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371 (1969). (Pet. App. 63). As Ingalls has asserted in other litigation, it has "an independent *Burnside* action against any settling third-party defendant who has not obtained Litton's consent to (such) settlement". *Lowe v. Ingalls Shipbuilding, a Div. of Litton Systems, Inc.*, 723 F.2d 1173, 1181 (5th Cir. 1980).

The BRB observed that the pre-death settlements netted an amount greater than Ingalls' compensation lien of \$15,454.15, which arose pursuant to Ingalls' payment of the May, 1983 § 8(i) settlement of Jefferson Yates' disability claim. (Pet. App. 48-49) (emphasis added). Since the

amount of the pre-death settlements exceeded the compensation due Mr. Yates, written approval of the pre-death settlements was not required under § 33(g)(1). If the "person entitled to compensation" settles with a third-party for an amount greater than or equal to the employer's total liability, prior written approval of the settlements is not required. *Cowart, supra*, at 2597; *Villanueva v. CNA Ins. Companies*, 868 F.2d 684, 687-88 (5th Cir. 1989); *Peters v. North River Ins. Co.*, 764 F.2d 306, 311 (5th Cir. 1985). The anomaly here is that Jefferson Yates was the "person entitled to compensation" at the time of the pre-death settlements, not Mrs. Yates, and no written prior approval of these settlements was required of Mr. Yates as well.

At the time of the pre-death settlements, Maggie Yates did not meet the prerequisites for entitlement to death benefits. Her claim for death benefits did not vest or accrue until Jefferson Yates' death. Therefore, she was not a "person entitled to compensation" within the meaning of § 33(g)(1). And, there was no forfeiture under § 33(g)(1) and (2).

**2. DOES THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS HAVE STANDING TO RESPOND TO A PETITION FOR REVIEW OF A BENEFITS REVIEW BOARD DECISION PURSUANT TO FED.R.APP.P. 15(a).**

There is a distinction between petitioning for a review of a BRB order pursuant to 33 U.S.C. § 921(c), and the authority to appear as a respondent pursuant to Fed.R.App.P. 15(a), an issue reserved by the Court in

*Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1278, 1284, 131 L.Ed.2d 160 (1995). The Director has routinely appeared as an intervenor because of the Director's administration and enforcement of the Act. The Court shows deference to the Director's interpretation of the Act. *I.T.O. Corp. v. Pettus*, 73 F.3d 523, 526 (4th Cir. 1996) (fn. 1).

The Petitioners argue that the Director's only reason for appearing as a Respondent is that "he does not agree with Ingalls". (Pet. Brief 33). Fed.R.App.P. 15(a) requires the petitioner seeking a review in an administrative agency's order to name the agency as a respondent. In light of Fed.R.App.P. 15(a) and because the Director's views are more than just of passing interest, it would be an anomaly to preclude the Director from expressing those views in court as a respondent on issues of national import.

The Secretary of Labor has the authority to appoint counsel to represent him or her "in any court proceedings under § 921". 33 U.S.C. § 921(a). Pursuant to that authority, the Secretary has named the Director of OWCP as his designee responsible for enforcing the LHWCA, and as the proper party to appear on behalf of the Secretary in all review proceedings. As a respondent, the Director is not required to stand mute, nor should he be expected to. The Fifth Circuit correctly followed precedent holding that the Director is a proper respondent under Fed.R.App.P. 15(a), which expressly requires a party seeking review of an agency order to name the agency as a respondent. *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275, 281-84 (5th Cir. 1982), *overruled on other grounds*, *Newpark*

*Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 818 (1984).

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## CONCLUSION

The Fifth Circuit correctly decided that Mrs. Yates' right to death benefits was not barred by § 33(g), because Mrs. Yates was not a "person entitled to compensation" at the time of the pre-death settlements. At the time of the pre-death settlements, it was Mr. Yates, not Mrs. Yates, who was the "person entitled to compensation". Mrs. Yates' claim for death benefits did not vest or accrue until Mr. Yates' death. Ingalls participated in a settlement of Mr. Yates' § 8 LHWCA claim during his lifetime. Ingalls recouped its LHWCA payments in full. Ironically, Ingalls now attempts to compel a forfeiture of Mrs. Yates' LHWCA rights because of third party settlements made when Mrs. Yates was not a "person entitled to compensation", and from which Ingalls benefited. No arguments based on "policy considerations" or "fairness" can justify a judicial amendment of the statute when it is clear by its terms. The holding of the Ninth Circuit in *Cretan* is clearly and hopelessly in conflict with this Court's holding in *Cowart*. Accordingly, the ruling of the Fifth Circuit should be affirmed.

The Fifth Circuit's ruling should also be affirmed on the standing of the Director as a respondent on appeal. The interest of the Director in such issues of national import is substantial, and the Director's views are entitled to deference. The notion that the Director's views are



entitled to deference would be meaningless if the Director is not permitted to present them in Court.

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SEP 19 1996

No. 95-1081

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In The  
**Supreme Court of the United States**  
October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN  
MUTUAL LIABILITY INSURANCE COMPANY, IN  
LIQUIDATION, BY AND THROUGH THE MISSISSIPPI  
INSURANCE GUARANTY ASSOCIATION,

*Petitioners,*

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, U.S. DEPARTMENT OF LABOR, AND  
MAGGIE YATES (Widow of Jefferson Yates),

*Respondents.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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## PETITIONERS' REPLY BRIEF ON THE MERITS

### PREFACE

This reply is directed to the Response Brief of Maggie Yates (Claimant), the Response Brief of the Federal Respondent (Director), and the Amicus Brief of "Asbestos Victims of America" (Amicus).

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### ARGUMENT

#### I. THE 33(g) ISSUE

Respondents concede that Mrs. Yates entered into unapproved third-party settlements where, in exchange for cash payments, she released her future claims for the wrongful death of her husband for less than the compensation to which she would be entitled from Ingalls pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"). They do not dispute that by entering into these unauthorized third-party settlements, Mrs. Yates exposed Ingalls to increased compensation liability to her by settling for amounts less than Ingalls' exposure to her under the LHWCA, and terminated Ingalls' subrogation rights against the asbestos manufacturers under the LHWCA. They do not disagree that the design of and purpose for 33 U.S.C. § 933(g) is to prevent a worker or those claiming through him from entering into unapproved third-party settlements for less than the compensation to which they are or would be entitled and thereafter seeking the difference from the employer who must pay benefits "irrespective of fault" under the LHWCA. *See* Claimant's Brief at pp. 20-23, 25, 26; *see also* Director's Brief at pp. 17, 28-30, 32, 33, 35-37; *Amicus* Brief at pp. 4, 20-23. Instead,



they argue that the plain language of § 933(g) creates a loophole which permits a claimant and those claiming through him to escape the responsibility to not prejudice the employer's interest which the statute was designed to protect.

The path to the loophole they claim to have found begins with the language in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992). They argue, extrapolating language from *Cowart*, that the right of a potential widow to receive death benefits does not vest until her husband dies. Although they concede that the compensation liability of Ingalls arose at the time of the employment injury to Mr. Yates, and concede that the longshore subrogation rights of Ingalls were terminated when Mrs. Yates entered into the unapproved third-party settlements, they argue that Mrs. Yates should be excused from the reach of § 33(g) because her unapproved settlements occurred before the death of her husband.

Respondents base their argument on the possibility that intervening events could terminate the right of a spouse to LHWCA benefits before the death of the employee occurs. The examples they give are divorce, the employee's death from an unrelated ailment, the spouse predeceasing the worker, or a change in the law. If any of those events occur, a spouse would not be entitled to LHWCA benefits for the employment-related death of the employee. At the same time, his employer would not be prejudiced by the spouse's unapproved third-party settlements because the employer would have no liability to the spouse under the LHWCA. However, the simple truth is that Mrs. Yates did not divorce her husband, his asbestos exposure did contribute to his death, and there was no material change in the law. In other words, there are no hypothetical scenarios here to consider as Mrs.

Yates has filed her claim and now seeks compensation from Ingalls notwithstanding her unauthorized third-party settlements. Given these circumstances, Ingalls was prejudiced by Mrs. Yates' unauthorized third-party settlements because she settled for less than the compensation to which she "would be entitled" from Ingalls, and Ingalls' LHWCA subrogation rights were terminated by the settlements.

The Respondents say "so what" as they interpret the phrase "person entitled to compensation" without regard to the context of the statute or the very purpose for which it was intended. They ignore the plain language of § 33(g)(1) which bars compensation to any person who enters into unapproved third-party settlements for "less than the compensation to which the person or the person's representative *would be entitled*." 33 U.S.C. § 933(g)(1) (1986) (emphasis added). They seek to limit the definition of "person entitled to compensation" to a worker or his survivors having a *current* right to be receiving biweekly compensation payments only at the moment in time that the unapproved third-party settlements occur. The prejudicial effect of such unauthorized settlements on a LHWCA employer is the same whether the claimant is entitled at that moment or "would be entitled" at a later time to be in receipt of LHWCA compensation payments.

Respondents' interpretation of a "person entitled to compensation" would mean that a wife who enters into unapproved third-party settlements on the day before her husband's death would not be barred by § 33(g)(1) from seeking LHWCA benefits against his employer on the day

following his death.<sup>1</sup> It would also mean that where a worker contracted an asbestos-related lung cancer which did not immediately cause him to miss work, he would not then be a "person entitled to compensation" under the Act,<sup>2</sup> thereby giving him a license to enter into unapproved third-party settlements without regard to the employer's liability. Later, when his disease progressed to where he could not work, he could then seek LHWCA compensation from his employer without regard to § 33(g). In either circumstance, that employer would be subject to increased compensation liability to the extent that the wife or the worker settled their third-party claims for less than the compensation to which they would be entitled from the employer. In either circumstance, the structure of and purpose for 33 U.S.C. § 933(g) would simply be ignored and of no account.

The effect which would result from an acceptance of Respondents' argument would also cause discrimination against one class of claimants but benefit two other classes. For example, those employees who receive injuries to their limbs are entitled to be paid compensation based on the percentage of *anatomical*, not economic, impairment to those limbs under 33 U.S.C. § 908(c)(1)-(20) (1986). Such employees are to be paid

<sup>1</sup> Had she entered into the unauthorized third-party settlements the day *after* her husband's death, all agree she would be barred by 33 U.S.C. § 933(g)(1)-(2) (1986).

<sup>2</sup> Under the Longshore Act, an award of biweekly compensation payments cannot be made in any occupational disease or whole body injury case unless the employee's wage earning capacity has been diminished by the injury or disease. 33 U.S.C. § 908(c)(21) (1986); *Gardner v. Director, OWCP*, 640 F.2d 1385, 1390 (1st Cir. 1981).

compensation for those anatomical impairments even if the injuries and impairments do not cause them to miss any time from work. *Potomac Elec. Power Co. v. Director*, 449 U.S. 268, 283 (1980). Thus, if such injured employees miss no work, they still are to be paid compensation for their anatomical impairments. If such persons sue and settle with responsible third-parties for such injuries, there can be no doubt that they are persons entitled to compensation.

The Respondents' argument, however, if applied to such claimants, would mean that they are only persons entitled to compensation if they are currently receiving or should be currently receiving payments from their employers. Where such a claimant was injured but had not yet been assigned an impairment rating for the injury,<sup>3</sup> under the Respondents' rationale such a claimant is not one entitled to compensation until his injured limb is given a rating, a result which leaves such a claimant free to settle with third-parties without any § 33(g) consequences, and without owing any § 33(f) credits/reimbursements.

Where the discrimination between classes of claimants occurs is best shown by examples. For the class of

<sup>3</sup> For example, the claimant in *Cowart* injured his hand. *Cowart*, 505 U.S. at 471. If he lost no work and had not been assigned an impairment rating at the time of his unauthorized third-party settlements, then given the Respondents' argument, Cowart was not a "person entitled to compensation" at the time of such settlements. If following those settlements, his doctor assigned a disability rating to his injured hand, Cowart could collect full compensation benefits from his employer without offset for his earlier third-party settlements. If § 33(f) and (g) are construed as Respondents would have them construed, the potential for double recovery by workers would be endless.



claimants with injuries to the limbs, such claimants, who are entitled to benefits regardless of any wage loss, who settle with third-parties without their employer's consent at a time when they had been assigned an impairment rating for that injury by the Act, will, without doubt, experience the application of § 33(f) and (g). See *Cowart*, 505 U.S. at 471-483. Conversely, a second class of claimants with job-related injuries like back injuries or those due to asbestos exposure who are not currently experiencing a wage loss will be free to settle with third-parties for those injuries in total disregard of their employer's interest or liability to them. Likewise, the third class, dependents and spouses like Mrs. Yates, would be free to settle their personal injury claims before the injured worker's death and simply ignore the employer from whom they will seek compensation benefits.

These examples reveal that the first class of claimants lack the ability to maneuver and skate around § 33(f) and (g), whereas the other two classes, based on how they handle the timing of their settlements, can simply settle around and in total disregard of the employer's interest. Such practical examples as these reveal that the Respondents' argument seeks not clarity, but to produce incongruous results depending on the fortuitous circumstance of what part of one's body is injured at work and the timing of the consummation of the third-party settlements. Such distinctions do not square with the purposes behind § 33(f) and (g), and lead to the phrase "person entitled to compensation" being applied and interpreted in different ways in all three sections where it appears – § 914(h), § 933(f) and § 933(g). The only path the Respondents' argument takes us down leads to disharmony, differing (discriminatory) applications of the LHWCA

depending on the type of claimant, body part injured, and timing of a third-party settlement, and leads to incongruity between similar sections of the LHWCA. "[I]t is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results." *Potomac Elec. Power Co.*, 449 U.S. at 283.

That disability and death benefits are distinct benefit categories under the LHWCA is irrelevant insofar as the compensation liability of a LHWCA employer is concerned. That liability is established at the time of injury. Moreover, the worker's right to benefits and, upon his death, those of his dependents, is/are established at the time of injury.<sup>4</sup> Section 8 of the Act provides for disability compensation to the worker because of his injury. 33 U.S.C. § 908 (1986). Section 9 allows a spouse and certain dependents to receive benefits, with the status of such persons being "determined as of the time of the injury." 33 U.S.C. § 909(f) (1986). The amount of compensation to be received by the worker and by his dependents upon his death are based upon the average weekly wage of the worker at the time of the worker's injury. 33 U.S.C. § 910 (1986). As can be seen, the entire compensation framework of the LHWCA, including its disability and death statutes, relates back to the time of the worker's injury. This is so regardless of when a claim is made or when a third-party settlement, obviously based on such an injury, is consummated.

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<sup>4</sup> Under the Longshore Act, the term "injury" is defined as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. . . ." 33 U.S.C. § 902(2) (1986).

Section 33 permits all workers and their potential beneficiaries the right to recover from third-parties without foregoing their right to compensation benefits under the LHWCA.<sup>5</sup> To the extent that the worker sustained a compensable injury, he and his dependents are "persons entitled to compensation" based upon that injury. They are free to pursue third-party claims arising out of that injury at any time before or after the worker's death provided they secure employer approval if they settle for less than the compensation to which they "would be entitled" under the Act. This is because the compensation liability of an employer is fixed at the time of the injury regardless of when the compensation claim is made. As such, the employer is entitled to protection against his employee, or those claiming through him, accepting too little for his or their third-party claims, the effect of which exposes the employer, liable "irrespective of fault," to excessive compensation liability once the claim is made. 33 U.S.C. § 904(b) (1986); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971). If the worker dies from a work-related cause, the employer's compensation liability simply shifts from the worker to his dependents. If the worker and his dependents were free to enter into unauthorized third-party settlements simply because the worker's injury was not then economically disabling or the worker had not yet died, and at the same time preserve all of their LHWCA

<sup>5</sup> Its purpose is to place the burden ultimately on the person whose fault caused the injury. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953); see *Peters v. North River Ins. Co.*, 764 F.2d 306, 310 (5th Cir. 1985).

rights against the employer, then the stated purpose of § 33(g) to protect employers from improvident third-party settlements would be eliminated.

The Respondents' interpretation of the phrase "person entitled to compensation" in § 33(g)(1) does not square with any reasonable interpretation of the same phrase in § 33(f) and § 14(h) of the LHWCA. For example, § 33(f) provides "if the person entitled to compensation" institutes a third-party proceeding, "the employer shall be required to pay as compensation a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person." 33 U.S.C. § 933(f) (1986).<sup>6</sup> If the Respondents' reading of "person entitled to compensation" is accepted, the § 33(f) credit would not be available to employers in any case where the worker secured a third-party recovery regardless of whether it was authorized or unauthorized by the employer. Potential scenarios which could defeat the § 33(f) credit include progressive occupational diseases such as asbestosis, asbestos-related lung cancer, silicosis, or even back injuries which had not progressed to the point of affecting a worker's wage earning capacity at the time of the third-party recovery. In the context of the LHWCA, they would not be "persons entitled to compensation" at the time of such recoveries received for the same job-related injuries covered by the LHWCA and

<sup>6</sup> In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), this Court observed that, because § 33(f) provides that a recovery from a third-party "reduces the compensation owed by the employer," the employer "is a real party in interest" in any recovery that might reduce or extinguish the employer's liability. *Cowart*, 505 U.S. at 482.



would be free to keep the third-party money and also seek compensation in full from the employer.

Similarly, § 14(h) of the LHWCA provides that the District Director shall, upon receipt of notice, from any "person entitled to compensation," make such investigations, cause such medical examinations to be made, or hold such hearings as he considers will properly protect the rights of all parties. If this phrase means what the Respondents say it means, then the District Director has no authority to investigate, schedule medical examinations, or hold hearings with respect to any worker who sustained an injury or occupational disease which had not then become economically disabling within the meaning of the LHWCA. Given this circumstance, the worker is not a "person entitled to compensation," and even if he needed medical treatment, he would not be entitled to the administrative benefits afforded him under § 914(h).

All parties in this case have argued that the plain language of the statute supports their position. However, does § 33(g)(1) speak with clarity to the unique facts of this case? If not, then the language of the statute does not directly answer the specific question posed, or is ambiguous, and judicial inquiry into the purpose behind the statute is required. *Stowell v. Secretary of Health & Human Services*, 3 F.3d 539, 542 (1st Cir. 1993); *Southeast Shipyard Ass'n v. United States*, 979 F.2d 1541, 1545 (D.C. Cir. 1992). If the language of § 33(g)(1) in isolation left any doubt, the intended purpose of the statute, which is to protect employers from improvident settlements, should remove that doubt.

Thus, if this Court finds § 33(g) to be ambiguous, a resort to the statute's purpose to clear any ambiguity will lead to one end: § 33(g) exists only for an employer's

benefit to guard against improvident settlements which serve to increase an employer's liability "irrespective of fault." *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971); see *Stowell*, 3 F.3d at 542; 33 U.S.C. § 933(g) (1986).

The Director argues, however, that if there is any ambiguity in the statute, then his view is entitled to deference. See Director's Brief at p. 29 n.12. This Court has previously held that the views of the Benefits Review Board are not entitled to special deference because it performs only an adjudicatory function and is not charged with administering the LHWCA. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). Similarly, in this case, the Director's interpretations should be entitled to no greater deference than that of the Benefits Review Board. *American Ship Bldg. Co. v. Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989); *Director, OWCP v. Detroit Harbor Terminals*, 850 F.2d 283, 287 (6th Cir. 1988); *Director, OWCP v. O'Keefe*, 545 F.2d 337, 343 (3rd Cir. 1976). In explaining why the Director's views should not be entitled to deference, several cases have cited the following rationale from *O'Keefe*:

Based upon our reading of the statute, we conclude that neither the Director of the Office of Workmen's Compensation Programs nor the Benefits Review Board is entitled to "great deference" in the interpretation of the 1972 amendments. . . . First, neither the Director nor the Board is the officer or agency charged with the administration of the statute. While the Director is authorized by Congress to administer the statute he does not resolve disputed legal issues involving the LHWCA. Substantial questions of

law arising in an adversarial context are specifically reserved for decision first by administrative law judges and then by the Board. Moreover, the Board is only a quasi-judicial body presented with select cases and not an agency involved in the overall administration of the statute. Congress has thus divided the various functions involved in administering the statute between the two different arms of the Department of Labor. We know of no authority which would require judicial deference to either one arm or the other under these circumstances.

*O'Keefe*, 545 F.2d at 343.

To be sure, the Director's views are not entitled to deference where they are articulated as a litigant in an adversarial proceeding rather than through the promulgation of regulations. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1984); *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 79 (1st Cir. 1992); *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324 (3rd Cir. 1987). Despite the fact that the phrase "person entitled to compensation" has been part of the LHWCA since its inception, the Director has never established a regulation regarding its intended definition. Moreover, the Director's position in this case is in direct conflict with the structure and purpose of § 33(f) and (g) and is entirely a litigating position, not a regulatory or administrative one, first advanced before the BRB and then the Fifth Circuit. His position is neither supported by the LHWCA nor mentioned in the underlying regulations.

The Director's position has also been inconsistent. As such, it is entitled to no deference. *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987). For example, in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991), the

Director argued that one's status as a "person entitled to compensation" need not be established at any particular moment. *Force*, 938 F.2d at 984-985. However, the Director has changed that position in this case. See Director's Brief at p. 34 n.16. Moreover, the Director argues here that the rights and responsibilities associated with a death claim do not arise until death, but in his comments to the final regulations following the 1984 amendments to the LHWCA, the Director stated that the rights and liabilities of a death claim arose at the time of injury since "coverage of a death claim does not turn on when death is sustained." 51 Fed. Reg. 4270, 4272 (1986). Accordingly, the Director's inconsistent interpretations should be entitled to no deference.

Respondents also argue that the Petitioners have not been prejudiced by Mrs. Yates' unauthorized third-party settlements, since the Petitioners retain the independent right to sue the third-parties for tort indemnity. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969). Under *Burnside*, an employer can assert a direct action in tort against the responsible third-party to recover payments made to the employee on account of his injury. *Burnside*, 394 U.S. at 418. The Respondents, however, cannot force the Petitioners to elect their remedies. Also, the LHWCA does not require the Petitioners to make such an election. The Petitioners are entitled to rely on their rights under the LHWCA. Further, a *Burnside* cause of action affords common law defenses to a third-party that are not available to the third-party in a direct action by the worker. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-13, at 460 (2d ed. 1994); see *Peters v. North River Ins. Co.*, 764 F.2d 306, 320 (5th Cir. 1985). The employer's right to be made



whole by the worker's third-party recovery is clearly justified given the fact that an employer has an absolute duty to compensate the worker regardless of fault. Moreover, the Claimant violated § 33(g)(1) when she entered into the unauthorized settlements, and the forfeiture provisions of § 33(g)(2) are self-executing regardless of *Burnside*.

In conclusion, the Ninth Circuit recognized in *Cretan* that the phrase "person entitled to compensation" must be given identical interpretations in both § 33(f), the crediting section, and § 33(g)(1) and 33(g)(2), the forfeiture sections of the Act. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 848 (9th Cir.), cert. denied, 114 S. Ct. 2705 (1994). To allow the Fifth Circuit decision in this case to stand would create a situation entirely at odds with the LHWCA's goals. If not "persons entitled to compensation," individuals such as Mrs. Yates will be able to retain both full compensation against LHWCA employers plus all third-party recoveries, which is precisely the outcome § 33(f) exists to preclude. Moreover, Ingalls and all other LHWCA employers would lose their statutory protection against improvident third-party settlements, thus writing § 33(g) into oblivion and thwarting the very purpose for which § 33(g) was created.

## II. THE DIRECTOR, OWCP, HAS NO STANDING TO PARTICIPATE IN THIS CASE

The Respondents concede that the Director has no statutory or financial interest in the outcome of this case. Nevertheless, they assert four grounds for granting the Director automatic standing as a respondent in this matter. First, they say that the Director, as a party respondent, need not have Article III standing since the "case or

controversy" requirement of Article III is satisfied by the controversy between Mrs. Yates and Ingalls. However, they offer no case law to support this proposition.

The Director must have some interest in the outcome of this litigation under Article III in order to actively participate because the jurisdiction of federal courts is limited to "Case" and "Controversies" by Article III of the Constitution of the United States. U.S. Const. art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case or controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The question of whether a party has standing involves both constitutional and prudential limitations on the exercise of federal jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To have standing before the court of appeals, one must have a "concrete and particularized, actual or imminent invasion of a legally protected interest." *Lujan*, 504 U.S. at 560 (emphasis added). Accordingly, entities having "no legal interest in maintaining or reversing a judgment or decree are not necessary parties to a writ of error or appeal." *Amadeo v. Northern Assurance Co.*, 201 U.S. 194, 201 (1905) (emphasis added); *Basket v. Hassell*, 107 U.S. 602, 603 (1883). Likewise, "[t]he general rule is that all parties in favor of whom a judgment or decree has been rendered below, or who are interested in having such a judgment or decree sustained . . . must be made appellees, respondents, or defendants in error." 36 C.J.S. *Federal Courts* § 201(5) (1955).

Using this rationale, the Fourth Circuit has consistently held that where the Director is not "adversely affected or aggrieved," then he does not have standing to respond to a petition for review before the court of appeals. *Parker v. Director, OWCP*, 75 F.3d 929, 935 (4th

Cir. 1996); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 526 n.1 (4th Cir. 1996); *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903, 909 (4th Cir. 1976) (en banc), vacated sub nom. *Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904 (1977), reaff'd, *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977) (en banc).

The second ground asserted by the Respondents is based upon § 21(c) of the LHWCA, 33 U.S.C. § 921(c). However, § 21(c) is silent on whether the Director, OWCP, must be made a party respondent. 33 U.S.C. § 921(c) (1986).<sup>7</sup> This silence is significant when laid beside other provisions of law. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1285 (1995). For example, the Black Lung Benefits Act provides that "[t]he Secretary shall be a party in any proceeding relative to [a] claim for benefits." 30 U.S.C. § 932(k) (1986). Likewise, the Civil Rights Act of 1964 specifically authorizes the Equal Employment Opportunity Commission to "intervene in a civil action brought . . . by an aggrieved party." 42 U.S.C. § 2000e-4(g)(6) (1986). Accordingly, if Congress intended for the Director to have automatic standing as a respondent before the Courts of Appeals in a case such as this, Congress would have most certainly said so in § 21(c).

The third ground cited by the Respondents is based upon § 921a, which provides as follows:

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<sup>7</sup> In fact, it is questionable whether the Director would ever have standing to participate before the Court of Appeals, since the section is only applicable to a "person" who has been adversely affected or aggrieved by the decision of the Board, and the Act does not include the Secretary or the Director within the definition of "person." 33 U.S.C. § 902(1) (1986).

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 21 or other provisions of this Act except for proceedings in the Supreme Court of the United States.

33 U.S.C. § 921a (1986).

Although the statute uses the phrase "in any court proceedings," the obvious intent of the statute was to let the Secretary of Labor appoint counsel in cases in which the Secretary, deputy commissioner, or Board would otherwise have standing to participate. For example, notwithstanding § 921a, this Court held that the Secretary, via the Director, OWCP, is not entitled to appeal a LHWCA case without a financial stake in the outcome. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995). Moreover, the implementation regulations, specifically 20 C.F.R. § 801.401, provides that counsel will be appointed by the Solicitor of Labor "on any issues requiring representation."

Construing § 21a as merely designating the entity authorized to appoint counsel is also consistent with the history of the 1972 Amendments. Before the 1972 Amendments, the Secretary was represented by U.S. attorneys in the judicial district where the case was pending. The Secretary was a necessary party, since his designee made the rulings which were appealable only by injunction against his designee. *Crescent Wharf & Warehouse Co. v. Pillsbury*, 259 F.2d 850, 853-854 (9th Cir. 1958). To reduce the Secretary's direct participation in litigation, the 1972 Amendments eliminated the Secretary's involvement from most aspects of the litigative process. See H.R. Rep. No. 1125, 92nd Congress, 2d Sess. 13-14 (1972). In conformance with the foregoing general intent, § 21a was



amended. The legislative history to the amendment to § 21a merely states the following:

This section amends section 21a of the Act. Under present law, it is the obligation of the United States attorney in the district where a case is pending to represent the Secretary or deputy commissioner in cases under the Act. Under the amendment made by this section, attorneys will be appointed by the Secretary to represent the Secretary, the deputy commissioner, a hearing officer, or the Board, except in proceedings in the Supreme Court.

H.R. Rep. No. 1441, 92nd Congress, 2d Sess. 21-22 (1972).

From the foregoing, it is obvious that § 21a was never intended to confer automatic standing upon the Secretary to participate in court proceedings where he had no real stake in the outcome. Instead, it merely gave the Secretary authority to hire his own counsel.

The final ground cited by the Respondents is based upon Rule 15(a) of the Federal Rules of Appellate Procedure. Rule 15(a) requires that an agency be named as a respondent in reviews of orders of an administrative agency. However, both the D.C. Circuit and the Fourth Circuit have held that Rule 15(a) is inapplicable to LHWCA proceedings, since the agency need not be named as a party to insure the proper adversarial clash between the employee and the employer. *Parker v. Director, OWCP*, 75 F.3d 929, 935 (4th Cir. 1996); *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 485 (D.C. Cir. 1982); *McCord v. Benefits Review Board*, 514 F.2d 198, 200 (D.C. Cir. 1975).

No section of the LHWCA or the Rules of Appellate Procedure automatically confers standing upon the Director to participate in court proceedings under the LHWCA

which do not affect his financial or statutory obligations. Accordingly, the Director must satisfy the Constitutional requirements of standing, the same as any other litigant. The silence of the statute must be interpreted to indicate that the Director lacks standing to respond where he lacks a concrete interest in the outcome. Therefore, this Court's ruling in *Newport News* should be extended to prohibit the Director's participation, whether as a petitioner or respondent, in the resolution of a private dispute between an employer and its employee.

### CONCLUSION

This Court in *Cowart* recognized that the term "person entitled to compensation" must receive the same interpretation in both § 33(f) and 33(g) in accord with "the basic canon of statutory construction that identical terms within an Act bear the same meaning." *Cowart*, 505 U.S. at 479. The construction of a "person entitled to compensation" urged by the Respondents and accepted by the Fifth Circuit in this case, if applied to § 33(f) and (g), would lead to incongruous results based on what body parts were injured and the timing of third-party settlements, and would defeat these provisions' purpose which is to protect employers and their liability imposed "irrespective of fault" from improvident third-party settlements. As Mrs. Yates' claim under the LHWCA related to and arose because of her husband's injury, and as Mrs. Yates settled with third-parties due to that job-related injury, her actions affected the Petitioners' liability exposure and triggered the protective features found in § 33. Accordingly, she is not entitled to any additional compensation from Petitioners, and the Fifth Circuit's ruling

below should be reversed and judgment rendered for Ingalls.

Additionally, the LHWCA gives the Director no standing, either as an appellant, petitioner, or respondent, to actively participate in a worker's compensation claim involving a private dispute between an employer and its employee. Accordingly, the contrary ruling of the Fifth Circuit should be reversed.

Respectfully submitted,

INGALLS SHIPBUILDING, INC., AND  
AMERICAN MUTUAL LIABILITY INSURANCE  
COMPANY, IN LIQUIDATION, BY AND  
THROUGH THE MISSISSIPPI INSURANCE  
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Dated: September, 1996



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1996

Supreme Court, U. S.  
FILED  
JUN 23 1996

INGALLS SHIPBUILDING, INC. and AMERICAN MUTUAL  
LIABILITY INSURANCE COMPANY, IN LIQUIDATION, BY  
AND THROUGH THE MISSISSIPPI INSURANCE GUARANTY  
ASSOCIATION,

v. *Petitioners,*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PRO-  
GRAMS, U.S. DEPARTMENT OF LABOR, AND MAGGIE  
YATES (Widow of Jefferson Yates),

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

BRIEF AMICI CURIAE ON BEHALF OF  
THE NATIONAL ASSOCIATION OF WATERFRONT  
EMPLOYERS, SHIPBUILDERS COUNCIL OF AMERICA,  
MASTER CONTRACTING STEVEDORE ASSOCIATION  
OF THE PACIFIC COAST, INC., AND  
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.  
IN SUPPORT OF PETITIONER

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1996

No. 95-1081

INGALLS SHIPBUILDING, INC. and AMERICAN MUTUAL  
LIABILITY INSURANCE COMPANY, IN LIQUIDATION, BY  
AND THROUGH THE MISSISSIPPI INSURANCE GUARANTY  
ASSOCIATION,

*Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PRO-  
GRAMS, U.S. DEPARTMENT OF LABOR, AND MAGGIE  
YATES (Widow of Jefferson Yates),

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

BRIEF AMICI CURIAE ON BEHALF OF  
THE NATIONAL ASSOCIATION OF WATERFRONT  
EMPLOYERS, SHIPBUILDERS COUNCIL OF AMERICA,  
MASTER CONTRACTING STEVEDORE ASSOCIATION  
OF THE PACIFIC COAST, INC., AND  
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.  
IN SUPPORT OF PETITIONER

## THE INTERESTS OF AMICI CURIAE

The National Association of Waterfront Employers  
(NAWE), formerly the National Association of Stevedores  
(NAS), is a not-for-profit tax exempt [26 U.S.C.  
§ 501(c)(6)] trade association organized under the laws  
of the District of Columbia whose 33 member companies



are stevedore contractor/marine terminal operators doing business at 110 ports on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the members exclusively doing business in Puerto Rico, every NAWA member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Shipbuilders Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, ship repairers, and component manufacturers located in all sections of the country. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) is a not-for-profit trade association whose 15 member companies provide contract stevedoring services in all principal ports in the states of California, Oregon and Washington, and provide substantially all the marine terminal and stevedoring services performed by private contractors to ocean-going vessels calling at ports in those states. MCSA member companies employ a work force of approximately 10,000 longshoremen and clerks who are engaged in maritime employment subject to the LHWCA.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers. Signal insures some 160 employers subject to the Act.

*Amici* collectively comprise the majority of insured and self-insured employers and insurance carriers covered by the Longshore and Harbor Workers' Compensation Act and a group self-insurance facility, and thus have an interest in conserving their financial resources by

avoiding a windfall overpayment to a dependent who claims § 9 death benefits after settling a third party wrongful death action prior to the death of a primary claimant.

*Petitioner Ingalls Shipbuilding, Inc. is not a member of the Shipbuilders Council of America, nor of any other amicus on this brief.*

The parties have consented to the filing of this brief. Letters of consent have been filed with the clerk pursuant to Rule 37.3 of the Court.

### SUMMARY OF THE ARGUMENT

The Fifth Circuit's reading of the Act adopts the flawed reasoning advanced by both private and federal respondents, and approved by the Benefits Review Board, the non-respondent Labor Department agency charged with review of ALJ decisions and whose final orders are subject to judicial review. In so doing, the Court reads a pension concept—vesting—which is completely alien to workers' compensation law into § 9 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, in a way that defeats the obligations imposed on all potential claimants by § 33 of the Act. The result is a decision which is diametrically opposite a recent opinion of the Ninth Circuit based on virtually identical facts. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994).

The decision below ignores the overall structure of the Act; the fact that all LHWCA rights and obligations, including those that arise under §§ 9 and 33, spring from employment-related injury; the federal respondent's written policy, published in the *Federal Register* during a rulemaking proceeding, which negates every aspect of its litigating position taken before the court and BRB below; and, most importantly, the strong public policy, clearly re-iterated by Congress and re-affirmed by this Court in recent years, underscoring § 33's bar against double re-

covery at the expense of a covered employer's limited financial resources.

In reaching its decision, the court below also failed to grasp the import of this Court's recent opinion applicable to § 8 disability claimants, *Cowart v. Nicklos*, 505 U.S. \_\_\_\_ (1992), and has thus placed some § 9 dependent claimants—potential widows like the private respondent—in a superior position to totally or partially disabled § 8 claimants, the Act's primary beneficiaries of recompense. Thus, by creating two different double recovery rules, the court below has placed an anomaly in the Act that neglects its very foundation, i.e., that all LHWCA liability for injury and death is employment-based. The creation of two separate rules governing liability has certainly never been sanctioned by any Congressional enactment.

In *Cowart*, the federal respondent originally took a litigating position in the circuit that favored double recovery at the employer's expense. Presumably, after it recognized that its position drew no support from the plain language of the LHWCA, its implementing regulations, or the legislative history of the 1984 Amendments to the Act, the federal respondent reversed its position, although not until after *certiorari* was granted.

Now, the federal respondent has flop-flipped and reverted to its original form, but for the first time in this Court.<sup>1</sup> By taking advantage of the distinction between § 9 dependent claimants and § 8 disability claimants,

<sup>1</sup> *Amici* are not certain whether the Federal respondent's latest iteration is at the flip stage or at the flop stage, given its recent history of taking one position followed by another on § 33 double recovery questions. *Amici* acknowledge that the federal respondent's § 9 argument is a new twist on the issue, but suggest that the Department of Labor is still attempting to litigate its interpretation of § 33 into law, despite the fact that its implementing regulations are unchanged since *Cowart* and offer no more support now than they did then.

the federal respondent has fashioned yet another litigating position by arguing against § 33's unmistakable bar against a double recovery.

At this point, given this history and the federal respondent's recent conduct resulting in other litigation involving the petitioner (See II, below), it must now be clear to even a casual observer that the federal respondent is conducting an unduly zealous and entirely questionable campaign in the courts to substitute its judgment for that of the Congress and to rewrite § 33 to fit its whim.

Federal respondent's latest effort is every bit as meritless as its original *Cowart* position. One need not dig too deeply to find the proof of this assertion. The federal respondent's position is absolutely contradicted by its own written policy position concerning the question of the "vesting" of LHWCA benefits and liabilities. This position was set forth in a rulemaking implementing the 1984 Amendments to the LHWCA, in which it stated in the clearest possible terms: "[C]overage of a death claim does not turn on when 'death (is) sustained.'" 51 *Federal Register* 4272 (Feb. 3, 1986) (emphasis added; See *n.9, infra*).

The discussion of the relationship between vesting, accrual, contingent claims, employment, injury, death, and survivor status in this rulemaking is dispositive of the question of when a dependent claimant becomes "entitled to benefits" for purposes of § 9 and/or § 33. (See, I-C below). As the federal respondent so aptly demonstrates, claimant rights and employer liability both spring from the point of an employment-related injury, and not at the point of a contingent event like death that, at most, gives rise to a claim or a cause of action.

Given the contrary nature of this rulemaking, it is not surprising that it did not surface below. One can conclude that, as in *Cowart* before the Fifth Circuit, some Departmental attorneys appear to be completely ignorant



of Departmental regulations—but always willing to respond with their agenda in the courts of appeals. Therefore, it is indeed truly ironic that the federal respondent's standing to actively respond to an appeal of an order of the Benefits Review Board by an aggrieved person pursuant to LHWCA § 21(c) is also being reviewed in this proceeding.

Nothing in the LHWCA authorizes this federal respondent—the Director, Office of Workers' Compensation—the right to “deem” itself into the federal courts as the proper federal respondent. Nor could it without doing injury to both FRAP Rule 15(a) and the entire body of law governing judicial review of final agency orders set forth in the Administrative Procedure Act. Yet Labor Department regulations, 20 CFR § 802.410(b), do just that, making a mockery of both.

And finally, the Court owes no deference to any element of the Department of Labor, be it the respondent Director, OWCP or the non-respondent Benefits Review Board.

*Amici* respectfully urge this Court to reverse the Fifth Circuit on both questions under review. Failure to reverse on Question number 1 will result in a repudiation of the longstanding public policy against double recovery at the expense of an employer's limited financial resources, and the circumventing of *Cowart*.

Failure to reverse on Question number 2 will result in a continuation of the federal respondent's presence in the courts of appeals, a presence which makes a mockery of the APA's judicial review limitation to *final* agency action. *Amici* are aware of no other administrator of a federal program not charged with prosecutorial duties, who continues to press the agency viewpoint as an active respondent during judicial review of the agency's own final order affecting private litigants. Under both the APA and the LHWCA, the Director's role, along with

every other element of the DoL, including the BRB, ends once an appeal is taken of a final order by an aggrieved party.

## ARGUMENT

### I. ALL LHWCA BENEFIT ENTITLEMENT AND OBLIGATIONS, INCLUDING THOSE CREATED BY §§ 9 AND 33, ARISE AT THE TIME OF AN EMPLOYMENT RELATED INJURY, AND DO NOT “VEST” AT A CONTINGENT EVENT—THE DEATH OF A PRIMARY CLAIMANT—AS THE COURT BELOW FOUND IN THE CASE OF § 33 ENTITLEMENT.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (“LHWCA”—“Act”), is a federal workers' compensation statute enacted after this Court held that state compensation statutes could not constitutionally reach injuries incurred upon the navigable waters of the United States, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and that Congress could not delegate the regulation of substantive maritime matters to the states, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Congress fashioned the Act primarily to recompense land based maritime employees for employment related injuries sustained on covered work sites. *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249 (1977).<sup>2</sup>

<sup>2</sup> The primary purpose of the Act is to provide both medical benefits and disability (or indemnity) benefits to covered maritime workers injured on a covered situs. LHWCA § 8, 33 U.S.C. § 908, sets forth four distinct classifications of indemnity benefits, labeled “disability” benefits, designed to recompense workers injured in the course of employment according to the severity and length of the disability. *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268 (1980). The Department has failed to provide implementing regulations covering § 8 disability claims with the exception of limited regulations governing hearing loss and occupational disease claims. 20 C.F.R. §§ 702.441 and 702.601.

LHWCA § 7, 33 U.S.C. § 907, sets forth employer obligations to provide medical care for employees injured in the course of

Notwithstanding the Act's principal purpose of providing disability and medical benefits to these primary claimants, § 9 of the Act also provides a distinct death benefit which "shall be payable" to designated survivors dependant—"as of the time of the [work related] injury"—on an injured worker who subsequently dies of the injury. 33 U.S.C. § 909(f). Surviving widows, such as the private respondent, are but one class of dependent claimants eligible to seek § 9 death benefits. 33 U.S.C. §§ 909(b) and (g).

Dependent claimants are third party statutory beneficiaries of the underlying employment relationship governed by the LHWCA. As with § 8 disability benefits payable to primary claimants, all employer obligated § 9 death benefits payable to surviving dependents are fixed and calculated at the point of the employment-related injury, not at the point of death. Or, in the words of the federal respondent: "Workers' compensation laws operate upon the employment relationship. The occurrence of an event or events in the course of that relationship is the foundation of any compensation-law liabilities that arise thereafter." 51 *Federal Register* 4272 (Feb. 3, 1986).

Employment-related injury is the cornerstone of the Act. All employer liability and obligations for recompense arise at this point, as do all claimants' rights and obligations, including those imposed by § 33.

Section 33 permits all claimants an additional recovery from third parties without forgoing any of the aforementioned statutory benefits. Central to the issue before this Court, § 33 permits all eligible "persons entitled to compensation"—including those to whom a § 9 death benefit is "payable" at some indeterminate time—to also recover damages against third parties if and when they so choose.

employment. Corresponding OWCP regulations are found at 20 CFR § 702.401.

Section 33 is the source of considerable confusion in the appellate courts, although its terms and intent are quite clear. This confusion emanates from the federal respondent's ever shifting position. Below, it and the private respondent have fashioned a new argument that a contingent event—the death of a primary claimant—trumps the employment-related injury basis of § 33 liability and obligations.<sup>8</sup>

The result is differing interpretations of § 33 between the court below and the Ninth Circuit's *Cretan* court. Neither disputes that a dependent claimant who settles wrongful death claims after the death of the primary claimant is a "person entitled to compensation" for purposes of § 33 of the Act. Rather, the dispute is strictly about whether or not a person who enters into one or more pre-death settlements while the primary claimant is still alive is a "person entitled to compensation."

The Fifth Circuit's opinion adopts the BRB's position urged below by both respondents. Both reasoned that a dependant claimant who settles potential third party wrongful death claims while the primary claimant is still living cannot possibly be a "person entitled to compensation" for purposes of § 33. Rather a person can become so entitled only by virtue of first becoming "vested" with the right to claim § 9 death benefits by the death of a primary claimant.

<sup>8</sup> Respondent's § 9 regulations do not support its newly framed litigating position. There are none. Like § 8, as noted above, the Department has failed to promulgate regulations implementing § 9, despite the fact that it covers an entire class of claimants. On the other hand, the department has promulgated regulations implementing § 33, which are applicable to "every person claiming benefits" and "any settlement . . . effected" and which do not in any respect require "vesting" of § 9 death benefits as a condition of being a person "entitled to compensation." 20 CFR § 702.281. *Amici* note that the absence of legislative regulations favors those in the Department who prefer making policy by crafting *ad hoc* litigating positions.



This interpretation requires a leap in logic starting with the premise that, because the structure of the Act distinguishes between § 8 disability benefits for injured claimants and § 9 death benefits for dependant claimants, it then follows that "the Act embodies the concept that [claimant's] action for death benefits would not be recognizable until [decendent's] death occurred." *Yates v. Ingalls Shipbuilding*, BRB Decision and Order, 28 BRBS 143 (June 29, 1994). Therefore, because a claimant's cause of action for death benefits occurs at the death of the primary claimant, a dependent cannot become a person "entitled to compensation" for purposes of § 33(g) until becoming "vested" to claim § 9 benefits by the death of a primary claimant.

That disability and death are distinct benefit categories within the Act is as irrelevant as it is obvious. Just because the Act distinguishes between the two types of benefits, it does not logically follow that each specie of benefits also has its own distinct "vesting" point, or that the concept of "vesting," if it even applies to § 9 dependent benefit claims, is at all a necessary predicate to trigger § 33(g) obligations. The plain language of § 33(a) clearly requires no such trigger.

The circuit court's interpretation does substantial harm to the workers' compensation theory at the very heart of the LHWCA. It ignores the fact that all benefit obligations and rights occur at the point of employment-related injury. And, by applying a pension concept alien to workers' compensation law—vesting—to the death of a primary claimant, an event that is no more than a contingency giving rise to a claim or a cause of action, the decision threatens the important features built into LHWCA § 33 designed to protect an employer's financial resources.

**A. The Public Policy Underscoring § 33 Is Defeated By The Circuit Court's Reading Of "Vested" By Virtue Of The Death Of A Primary Claimant Into "Person Entitled To Compensation".**

The Fifth Circuit's decision ignores the strong public policy underscoring § 33's principal purpose of protecting a covered employer's financial resources, while the Ninth Circuit grounded its holding firmly on this longstanding policy. The Ninth Circuit's reasoning, found squarely within compensation law, is more compelling than the Fifth Circuit's reasoning, which thrusts a pension law concept into the very heart of workers' compensation law.

The LHWCA is the primary delivery system for recompensing injured employees. The Act provides the exclusive remedy against an injured worker's employer and offers designated benefits to his/her dependents. Covered employers are liable for compensation regardless of fault.

Originally, § 33 of the LHWCA required a claimant to elect statutory compensation from the employer or file a damages suit against a third party. This election of remedies requirement was abolished in part by the 1938 amendment to the LHWCA (Act of June 25, 1938, ch. 685, §§ 12, 13, 52 Stat. 1168) and deleted entirely by the 1959 amendment to the Act. (P.L. 86-171, 73 Stat. 391). As presently written, § 33 of the LHWCA grants claimants the right to seek tort relief against third parties without waiving the right to seek LHWCA benefits. This right is assigned to employers under certain circumstances, but may revert back to the employee. LHWCA § 33(b). This assignment to employers, in and of itself, reflects the importance Congress places on making the primary delivery system—employer provided compensation insurance—whole whenever possible.

Section 33 permits claimants an additional tort recovery against third parties without losing the right to LHWCA benefits, provided claimants take certain steps

to protect the employer. These § 33 protections are of critical importance to conserving the employer/carrier financial resources necessary to fund the program, and foreclose the possibility of a double recovery at the expense of the employer, should a claimant's third party recovery prove successful. These protections are found at §§ 33(f) and (g) and are ordinarily accomplished by the employer's filing of a subrogation lien against a third party settlement or judgment, or subtracting an earlier recovery from the amount of LHWCA benefit owed.<sup>4</sup> Employers are obligated only for the difference, if any, between total benefits due under the LHWCA and the third party recovery. Claimants are permitted to retain any excess of a settlement or judgment which exceeds the LHWCA benefits which are payable.

This Court has recognized the importance of these statutory protections to the overall delivery of recompense to claimants. Employer insurance programs, the primary delivery system relied upon by injured workers, is to be made whole to the extent possible. See *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 100 S.Ct. 925 (1980); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753 (1979).

Congress intended that § 33 be read broadly to protect employers irrespective of when a claimant files a claim for compensation or files a third party action. Even recent legislative history confirms this view.

<sup>4</sup> § 33(f) of the Act allows employers the right to offset the cost of a LHWCA claim against any damages recovered by a "person entitled to compensation" in order to both avoid a double recovery at the employer's expense and conserve an employer's/insurance carrier's financial resources to pay future claims. The courts have read this to permit the use of a subrogation lien.

§ 33(g) offers further protections to employers against improvident and/or secret settlements by "persons entitled to compensation." See, e.g., *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980); *Cowart v. Nicklos Drilling Co.*, 505 U.S. — (1992).

In discussing a proposed amendment to § 33(g), which was later enacted into law, the Report of the Senate Labor and Human Resources Committee stated that the redrafted § 33(g) is designed "to assure that *all entitlement* to compensation and other benefits otherwise available under the Act is forfeited *whenever* a third-party action is resolved without the employer's formal written approval." S. Rept. 98-81, pg. 45, May 10, 1983 (Emphasis added).

Later in the legislative process, the House Education and Labor Committee Report said that the redrafted § 33(g) "further provides that if a claimant who has brought a cause of action against a third party enters into a settlement in an amount less than the amount to which the claimant would be entitled under the Longshore Act, the employer shall be responsible for additional compensation *only if* the employer has approved the settlement agreement." H. Rept. 98-570, Nov. 18, 1983, pg. 30-31 (Emphasis added).

The Ninth Circuit's *Cretan* analysis comports fully with the intentions of the two Congressional Committees of jurisdiction, and with the longstanding Congressional intent to protect an employer's limited financial resources by permitting an offset against any and all third party recoveries. It is also in keeping with the plain language of § 33. The Fifth Circuit, on the other hand, ignored the public policy behind the section, and choose to read § 9 into § 33 of the Act.

**B. By Its Terms § 33 Does Not Require The Death Of A Primary Claimant Before A Dependent Claimant Becomes A "Person Entitled To Compensation" Any More Than It Requires The Death Of A Primary Claimant Before A Dependent Claimant Is Allowed To Recover Damages Against A Third Party For A Potential Wrongful Death.**

The crux of respondents' argument depends on reading a condition precedent, i.e., the death of a primary claimant, into the term "entitled to compensation" as it is



found throughout § 33. But a close reading of § 33, particularly § 33(a) which establishes the overall relationship between LHWCA claims and third party actions, reveals that the death of a primary claimant is simply not a condition that governs the timing within which a person becomes "entitled to compensation" for purposes of any subsection of § 33, including § 33(g)'s forfeiture obligations at issue here.<sup>6</sup>

Assuming, *arguendo*, that respondents' construction is correct and that only the death of a primary claimant can "vest" a dependent claimant with the mantle of a "person entitled to [LHWCA death benefits] compensation," then logically by the terms of § 33(a), if a person should "recover damages against a third [party]" by way of a settlement of potential wrongful death claims even while the primary claimant is still alive, the person, by definition, is "not entitled" and thus falls outside of § 33(a)'s statutory right to seek a LHWCA remedy. Put another way, a "not-entitled" person who settles potential wrongful death claims loses the statutory protection afforded by the "need not elect" a remedy provision, and thus has no legal right to file a claim for § 9 death benefits upon the death of the primary claimant. (See I-C below). Read literally, claimants such as the private respondent have no right of "entitlement to compensation" under § 33.

This construction is every bit as plausible as the one advanced by respondents, but, as with their construction of § 33(g) entitlement, it defeats a principal purpose of the section, i.e., permitting a claimant both a tort remedy and a LHWCA remedy.

However, the fact is that, by the terms of § 33(a), a primary claimant's death is no more required to give

<sup>6</sup> LHWCA § 33(a) reads in pertinent part "If on account of disability or death for which compensation is payable under this Act, the person entitled to such compensation determines that some other person . . . is liable in damages, he need not elect to receive such compensation or to recover damages against such third party." 33 U.S.C. § 933(a) (emphasis added).

breath to the term "entitled to compensation" than it is to give effect to the term "recover damages against a third [party]" for potential wrongful death actions.<sup>6</sup> The election of a non-LHWCA remedy simply does not depend on first having a deceased primary claimant, and it does not negate a later § 9 claim for death benefits.

By its terms § 33(a) simply does not condition "entitlement" to death benefits on the death of a primary claimant or require that it precede the determination and pursuit of a third party recovery in any respect, only that the entitlement occur at some point in the process. The use of the present tense "is payable" indicates that the employer's obligation for death benefits is open at all times subsequent to a covered injury and relevant to the lengthy process covered by the subsection. Section 33 simply does not fix a point in time that a person becomes "entitled to benefits."

The natural reading of this section allows the dependent claimant both a LHWCA death claim if and when it arises, and a recovery against a third party—even, as below, if the recovery takes the form of a settlement of future wrongful death claims in anticipation of a death yet to occur. Obviously the private respondent below, having already achieved § 9 dependent status, had fully anticipated the forthcoming death of the injured LHWCA claimant at the time she settled her potential wrongful death claims.

<sup>6</sup> Section 33(a), while little more than an unpunctuated, run-on sentence, is phrased in the present tense but is clearly applicable to an unfolding series of events starting at the point of a covered injury and ending after the death of the primary claimant, should such a death so occur. Re-phrased, as it concerns § 9 death benefit claims, the subsection would read thus: "If . . . the person entitled to [death benefits payable under § 9] determines that some other person . . . is liable in damages [for the death of a primary claimant] . . . he need not elect . . ." It is readily apparent that the timing of the "entitlement" relative to the "determination" of third party liability is indeterminant.

Therefore, recovery from a third party by way of a settlement of potential wrongful death claims, fully satisfies the § 33(a) statutory scheme, and does not eliminate a claimant's obligations to comply with § 33(g), as urged by both private and federal respondents.

There is nothing contradictory in *Cowart* as it applies to § 8 disability claims. *Cowart* held that § 33 entitlement obligations arise at the point of injury, not later at the point of actually receiving benefits. By its terms, § 33 requires no less of dependent claimants.

**C. The LHWCA Statutory Scheme Compels The Conclusion That § 9 Dependency Status Attaches At The Point Of An Employment-Related Injury, And Not Upon The Death Of The Primary Claimant.**

LHWCA § 9 obligates covered employers to provide certain death benefits payable to the eligible surviving dependents of a deceased maritime worker injured in the course of employment. Surviving spouses will ordinarily qualify, as the respondent below does. LHWCA §§ 9(b) and (g).

To establish the dependent status necessary to claim § 9 death benefits, several conditions must first be satisfied. Foremost is the absolute requirement of dependency as of the time of the underlying injury. § 9(f).<sup>7</sup> In addition, the Act also requires that the surviving spouse meet one of several additional requirements, normally continued dependency, at the time of decedent's death. § 2(16).<sup>8</sup>

<sup>7</sup> LHWCA § 9(f) provides "All questions of dependency shall be determined as of the time of the injury." 33 U.S.C. § 909(f) (emphasis added).

<sup>8</sup> LHWCA § 2(16) provides: "The terms 'widow or widower' includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time." 33 U.S.C. § 902(16).

Failure of either requirement defeats dependency status, and thus the right to claim a death benefit.

It is dependency on the injured primary claimant, starting at the time of the injury and concluding with the time of death that confers dependency status. Dependency status is employment based. It alone places a potential claimant into the zone of interests protected by § 9. It alone confers on a dependent the right to claim § 9 death benefits, even though contingent on the death of a primary claimant, as below.

Heretofore, the federal respondent shared this view. According to her written policy, employment-related injury alone gives rise to all future benefit claims, including death claims. The resulting right to claim death benefits, among other rights conferred by the Act, are no more than "future liabilities resulting from [employment events], though contingent in duration and amount on future events (*and hence neither 'accrued' nor 'vested'*) . . . [and are] incurred by the employers . . . *at the time of the employment events.*" The federal respondent concluded: "[C]overage of a death claim does not turn on when 'death (is) sustained.'" 51 *Federal Register* 4272 (Feb. 3, 1986) (emphasis added).<sup>9</sup>

<sup>9</sup> In this Rulemaking promulgating the final regulations implementing the 1984 Amendments to the LHWCA, P.L. 98-426, it became necessary to explain the relationship between the LHWCA, as amended, and the recently enacted amendments to the District of Columbia Compensation Act, and the effect of the two statutes on all injuries, deaths, benefit entitlement, employer liabilities, etc., that had the appearance of being commonly covered by both statutes. In the course of explaining why the law in effect at the time of the injury governed all subsequent claims, including death claims, the federal respondent clearly proclaimed the view that death benefits are no more than contingent liabilities based on injury incurred during the employment relationship. The right to death benefits arises, not when "death is sustained" but at the point of employment-related injury, and does *not* accrue or vest, but is "contingent" on some future event, in this case the death of the primary claimant. Now the federal respondent is pressing the opposite view in the courts. It cannot have it both ways.



The LHWCA § 9(f) makes it clear that a dependent claimant's right to recover § 9 death benefits attaches at the point of dependency, i.e., an employment-related injury, the very same point at which a primary claimant's right to recover medical and disability benefits attaches. The point of injury also fixes *all* employer benefit obligations to claimants eligible to receive benefits, whether § 8 disability or § 9 death benefits.

**D. "Vesting"—A Pension Concept—Is Completely Alien To Workers' Compensation Law And Must Be Abandoned.**

Despite federal respondent's written policy, it is now pushing a contrary *ad hoc* litigating position, and is urging that the term "vested," culled from this Court's *Cowart* opinion, is indeed applicable in the context of LHWCA death benefit claims and places its occurrence at the point of death of a primary claimant, further arguing that it is a necessary condition before a person can become "entitled to benefits" for purposes of § 33.

The use of the term is less than suitable to workers' compensation law or to the LHWCA benefit structure, and ought to be abandoned right here. But, *amici* suggest that if the term is applied as it is commonly used in the pension arena, it actually defeats the conclusion of the court below that only the death of a primary claimant "vests" a dependent claimant with the absolute right to receive § 9 death benefits, and thus § 33(g) entitlement obligations.

A participant in a defined benefit pension plan normally vests upon satisfying the plan's vesting requirements, an event that may occur long before the participant retires. Retirement, or some lesser act permitted by the terms of the plan, triggers the claim for pension benefits and/or a cause of action against the plan for failure to provide them. Because there is a lag time between "vesting" and "pay status" there is no absolute certainty that a "vested"

participant will actually receive benefits. For example, the premature death of a "vested" claimant may induce forfeiture of all benefits, and relieve the plan of any further financial obligation to the participant. Moreover, even though fully "vested," a participant could in fact experience a deep cut in the benefit to which he/she is entitled, should the plan be underfunded, terminated and placed in the Employee Retirement Income Security Act Title IV insurance program, P.L. 93-406.

Similarly, LHWCA § 9 dependency status arises at the point of injury. All rights and obligations imposed by the Act spring from this point. This may well occur much earlier than at the death of the primary claimant, as it did below. Like retirement in the pension analogy, the death of a primary claimant triggers a claim for death benefits. Also, as in the pension analogy, a potential § 9 dependent may never actually recover any death benefits because, *inter alia*, the dependent may not live longer than the primary claimant or the primary claimant may die of other causes. These contingencies, however, do not negate the fact that the dependent is still "vested" by virtue of the status conferred by the employment related injury.

The court below read the term "vesting" as requiring an absolute right to a benefit, and compounded its error of adopting the term to the LHWCA in the first place, by placing "vesting" at the point of a contingent event: the death of a primary claimant. The Court reasoned that it could not possibly occur any earlier because this would subject a dependent claimant to the possibility of being divested by any number of subsequent events beyond her control. As just noted though, even a vested participant in a defined benefit pension plan is not absolutely protected from becoming divested of vested benefits because of subsequent events beyond the participant's control.

Regardless of the fact that, as just pointed out, the term can be read in a manner compatible with the statute,

as this Court did in *Cowart*,<sup>10</sup> the circuit court's reading of the concept of "vesting" into the Act is just plain bad law for the following reasons. First, the concept has no application to the LHWCA benefit structure as witnessed by the court's application of the concept to the wrong point in the LHWCA scheme, at the contingency of death. As noted above this reading ignores the fact that all LHWCA benefit obligations and rights arise at the point of an employment-related injury, and not at the point of such a contingency. Secondly, forcing this alien concept into the Act can only add more legal chaos to the system. Thirdly, the court has simply confused the concept of vesting with the concept of a cause of action. And finally, adding insult to injury, its reading permits some—but not all—dependent survivors a windfall benefit over those granted to the primary claimant, in clear violation of the language and public policy underlying § 33.

## II. DEFERENCE IS NOT OWED TO THE FEDERAL RESPONDENT.

The federal respondent's position is entirely an *ad hoc* litigating position, first taken before the BRB and then before the Fifth Circuit. It is not reflected in the LHWCA or in respondent's implementing regulations and, in fact, is expressly contradicted by the OWCP rulemaking noted above. It is solely the product of departmental lawyering made "on behalf of" the Director, OWCP—who, *amici* submit, is not even the proper FRAP Rule 15(a) respondent (See III, below)—and advanced by the non-policy making Benefits Review Board, an agency that this Court recently acknowledged is owed no deference by the Courts. *Cowart*, slip opinion at 9.

<sup>10</sup> In that case the Court utilized the term in a general sense and placed it at the point where it belongs, if at all, i.e., at the point of employment-related injury.

Yet the federal respondent seeks deference to its interpretation of LHWCA § 33 first and only advanced in litigation. This Court has determined that the litigating "views" of an agency do not warrant deference if they are not supported by agency "regulations, rulings or administrative practice" and has "declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position. . ." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, at 212 (1988).

Such is the case here. Even more telling, the federal respondent's litigating position is entirely contradicted by its own regulatory rulemaking, as noted above, and therefore entitled to even less deference than it would be otherwise. An agency interpretation. . . "which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). (citations omitted).

Consequently, as to the federal respondent's position on the purely LHWCA issues involved in Question No. 1, *amici* submit that the views of the federal respondent cannot possibly be entitled to deference.

Remarkably, the Director argues that its views on Question No. 2 are also entitled to deference. See Brief for Federal Respondent opposing the Petition for a Writ of *Certiorari*, p. 15. This assertion is absurd. Deference to an administrative agency on an interpretation of its own generic statute is one thing, but deference on an interpretation of FRAP Rule 15(a) and the judicial review provisions of the LHWCA, which incorporate the Administrative Procedure Act ("APA"), see *Director, OWCP v. Newport News Shipbuilding*, — U.S. — (1995), are entirely another matter. Interpretations of Rule 15(a) and the APA are solely within the prerogative of the courts. Deference here is not justified, as inter-



pretations involving either a Federal Rule or the APA are simply beyond the competence of this federal respondent.

*Amici* suggest that there is yet another reason why this Court should not defer to the federal respondent. Judging from its recent conduct involving the routine administration of the Act, and its persistence in continuing to press its unsubstantiated view of § 33 on the BRB and the courts, it appears to *amici* that the federal respondent is engaged in a crusade. Since *Cowart*, it has acted defiantly in performing its non-discretionary statutory obligations involving § 33 third party claims. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130 (5th Cir. 1994), and has ignored the gist of a district court order, *Ingalls Shipbuilding, Inc. v. Director, OWCP and Wilber Boone*, Nos. 94-10778 *et al.*, — F.3d — (5th Cir. 1996). Conduct such as this simply cannot be condoned, let alone rewarded. Federal lawyers have obligations beyond conducting a holy war against a disfavored party. See *Freeport-McMoRAN Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45 (D.C. Cir. 1992).<sup>11</sup>

*Amici* submit that deference to the federal respondent under these circumstances is out of the question.

<sup>11</sup> This conduct is compounded by the fact that, while departmental lawyers have made an artform of arguing their way into the appellate courts, often taking *ad hoc* litigating positions in the process, see, e.g., *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, — U.S. — (1995); *Director, OWCP v. Greenwich Collieries*, — U.S. — (1994); and *Cowart v. Nicklos Drilling Co.*, 505 U.S. — (1992), the Director, as pointed out above, has yet to promulgate legislative regulations implementing two of the key sections of the Act, §§ 8 and 9. Regulation is being made through litigation.

### III. THE FEDERAL RESPONDENT IS WITHOUT LAWFUL AUTHORITY TO CONTINUE ENGAGING A DISFAVORED PARTY IN THE COURTS ONCE AN AGGRIEVED PARTY APPEALS A FINAL ORDER OF THE BRB.

Two separate legal regimes govern whether or not a federal entity can properly come before a court of appeals on an appeal of a final agency order by an aggrieved party. First, Rule 15(a) of the Federal Rules of Appellate Procedure governs “[r]eview of an order” of an administrative agency, board, etc., and requires that “the agency must be named respondent.” While the rule does use the term “agency,” it clearly contemplates that it is the agency issuing the final order subject to appeal that is to be named federal respondent (“agency will include agency, board, commission or officer”). For LHWCA cases, that agency is the Benefits Review Board, not the Director, Office of Workers’ Compensation Programs. LHWCA § 21(c).

No other interpretation of the Rule makes sense. However, the federal respondent has “deemed” itself, through its regulations, “to be the proper party on behalf of the Secretary of Labor in all review proceedings” into the role of the federal respondent, thus usurping the authority of FRAP Rule 15(a) designating the proper federal respondent as the agency whose order is under review. 20 CFR § 802.410(b). A DoL regulation cannot be sufficient to overcome the force of an Appellate Rule.

Not content to merely usurp the BRB, the federal respondent has also parlayed respondent status into an active participatory role before the appellate courts, a role unlike any other non-prosecutorial administrative agency. It has accomplished this by promulgating a whole host of interlocking regulations, including the following: 20

CFR § 702.333(b); 20 CFR § 801.2(a)(10); 20 CFR § 802.410(b).<sup>12</sup>

Despite these regulations, the federal respondent's presence runs afoul of the second legal regime governing agency conduct in the appellate courts, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* Despite the federal respondent's then strong protestations to the contrary, the APA applies to LHWCA adjudications, *Director, OWCP v. Greenwich Collieries*, — U.S. — (1994), and along with LHWCA § 21(c), governs judicial review of BRB final orders; *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, — U.S. — (1995).

Both LHWCA § 21(c) and APA § 704 clearly indicate that only final agency action is to be the subject of judicial review sought by an aggrieved party. Inherent in this requirement is the precept that agency involvement is through once a final order is issued. Final agency action means final agency action, and not another chance or two to litigate against a disfavored party, or change a final order of the BRB in disagreement with the position of the administrator of the Act.

Under both the LHWCA and the APA, the federal respondent's lawful role is limited to those activities pointed out by this Court in *Newport News*, Slip opinion at 9. Whatever the Director's permissible statutory role during the administrative hearing stage, it ends once an appeal is taken of a *final* BRB order.

It's that simple.

<sup>12</sup> *Amici* note that it has been 15 months since this Court's *Newport News* opinion denied the federal respondent the right to appeal a BRB final order to the circuit courts, and that the Director has yet to make an effort to conform these regulations with this opinion.

## CONCLUSION

The LHWCA governs the legal rights and obligations of covered maritime employers and workers injured on a covered situs. It also grants designated dependents status and the right to be recompensed should an injured claimant subsequently die of the employment-related injury. The common statutory basis applicable to every claim, however, is that all arise at the point of the employment-related injury. This fundamental premise of the Act applies equally to claims governed by §§ 9 and 33. This fact is acknowledged in the written policy issued by the federal respondent during the rulemaking noted above, but ignored by her lawyers in the agency judicial process and appellate review below.

Respondents' "vesting" argument isolates some § 33 third party claims and obligations from the rest of the Act, thereby creating two different rules of law for claims arising out of the same set of facts. Thus, the continuity between benefits designed into the Act by Congress is destroyed.

As this Court has acknowledged, there is a strong public policy underscoring § 33 and its importance to the rest of the LHWCA benefit scheme. "Vesting," a pension law concept alien to workers' compensation law, has no place in this scheme, and therefore must be abandoned.

As pointed out above, the federal respondent's *ad hoc* litigating position can only be construed to contradict the LHWCA scheme, public policy, and the federal respondent's prior written position on the very question before the Court. The usual basis for judicial deference—reasonable and in keeping with statutory authority—is, then, notably missing. Thus, the federal respondent's position deserves no deference on the first question before the Court.

Despite FRAP Rule 15(a) and the LHWCA/APA requirement of final agency action, this federal respond-



ent has built a regulatory platform carving out for itself an active participatory role in the courts. It is both a pretender to the throne and, literally, an officious intermeddler. On this question, the position advanced by the federal respondent also warrants no deference. It is past time that the federal respondent be placed on par with other administrative agencies of its character.

Therefore, *amici* submit that the Court below erred on both questions and must be reversed.

Respectfully submitted,

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Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN  
MUTUAL LIABILITY INSURANCE COMPANY, IN  
LIQUIDATION, BY AND THROUGH THE MISSISSIPPI  
INSURANCE GUARANTY ASSOCIATION,

*Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, U. S. DEPARTMENT OF LABOR, AND  
MAGGIE YATES (Widow of Jefferson Yates),

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF  
BETHLEHEM STEEL CORPORATION  
IN SUPPORT OF PETITIONERS'  
ARGUMENTS SEEKING REVERSAL

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## INTERESTS OF AMICUS CURIAE

Bethlehem Steel Corporation<sup>1</sup> employed over two million maritime workers in the eleven shipyards it owned and operated throughout the periods during which most of the nation's asbestos-related disease cases arose. Pursuant to the requirements of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, *et seq.* ("LHWCA" or "Act"), Bethlehem has either provided benefits to or faces claims to benefits from thousands of workers and dependents who also seek or have recovered substantial sums from companies who manufactured the asbestos-containing products once commonly used throughout this nation's shipyards.

If the Fifth Circuit's decision is affirmed, Bethlehem and all other maritime employers will lose both the statutory right to credit third-party recoveries against benefits payable pursuant to the LHWCA and the protections against inadequate civil settlements that Sections 33(f) and (g), 33 U.S.C. Section 933(f), (g), were specifically crafted to provide. The financial impact upon maritime employers of a ruling permitting workers and their families to retain both civil recoveries and full compensation benefits will be immense.

Bethlehem Steel Corporation believes that its participation in this proceeding will bring to the attention of the Court relevant information not otherwise available to it.

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<sup>1</sup> Pursuant to Rule 29.1, Bethlehem Steel Corporation states that it has issued shares to the public but that none of its parent or subsidiary companies has done so.

The first of the issues to be reviewed involves the conflicting opinions of the Fifth and Ninth Circuit Courts of Appeal. Bethlehem was the successful respondent/cross-petitioner in *Cretan v. Bethlehem Steel Corporation*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), the decision directly at odds with that now under review. Bethlehem's participation in that proceeding permits it to bring to this Court's attention the information necessary to an understanding of the Ninth Circuit's reasoning and a fuller appreciation of the flaws in the Fifth Circuit's rejection of the *only* interpretation consistent with Congress' intent.

Bethlehem's arguments support those of Petitioners and seek reversal of *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs (Yates)*, 65 F.3d 460 (5th Cir. 1995).

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### SUMMARY OF ARGUMENT

The Ninth Circuit recognized that this Court's conclusion in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), that the phrase "person entitled to compensation" *must* be given identical interpretations in both the crediting and forfeiture sections of the LHWCA would create a situation entirely at odds with Congress' goals if the interpretation adopted by the Fifth Circuit were accepted. If not "persons entitled to compensation," individuals such as the two surviving Cretans and Ms. Yates will be able to retain both full compensation and all civil recoveries, precisely the outcome Section 33(f) exists to preclude.

Their employers will lose all protections which Section 33(g) was created to provide against inadequate settlements.

In *Cretan*, the Director, Office of Workers' Compensation Programs, openly acknowledged that these results would thwart Congress' plans and purposes.

Here again, the Director agrees generally with the perception on which Bethlehem relies: that the underlying general purpose and plan of § 33(f)-(g) apply to all proceeds of claimants' causes of action for compensable injuries or deaths, regardless of how (with or without instituting proceedings) or when (before or after the cause of action or the entitlement to compensation has arisen, accrued, vested, or been recognized in a formal order) the tortfeasor is ordered or agrees to pay those proceeds.

*Cretan*, Brief for Respondent Director, OWCP, p. 29.

Forced to choose between a construction that would obstruct Congress' goals and one that would not, the Ninth Circuit concluded that there was "little sense in a distinction that turns on whether the death for which settlement is made has yet to occur" and, returning to its analysis in *Force v. Director, Office of Workers' Compensation Programs*, 938 F.2d 981, at 984 (9th Cir. 1991), concluded that "the entitlement does not have to have become vested at the time the settlement is made."

'The only relevant question is whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur.' *Force*, 938 F.2d at 984 (quoting Director's Brief).

*Cretan*, 1 F.3d at 847.

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## ARGUMENT

Sections 33(f) and (g) must be read together.<sup>2</sup> Each contains the "person entitled to compensation" phrase which this Court has ruled must be given the same meaning in each statutory section. Both have a common purpose: protection of employers' interests. Section 33(g) exists to protect the employer "against his employee's accepting too little for his cause of action against a third party." *Cowart*, 505 U.S. at 483 (quoting *Banks v. Chicago Grain Trimmers*, 390 U.S. 459, 467 (1968)). Section 33(f) prevents double recoveries by assuring protection of the employer's "inviolable" right to recover paid LHWCA benefits. See *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980). Together, Sections 33(f) and (g) frame a "brutally direct" and "unmistakable scheme" which permits "no exceptions." *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 647 (5th Cir. 1986).

The legislative history proves that Congress intended that there be no exceptions to the scope of Sections 33(f) and (g). The LHWCA was enacted in 1927. Act of Mar. 4, 1927, Ch. 509, 44 Stat. 1424. It initially required a "person entitled to compensation" to elect between accepting compensation and seeking damages from a third party. § 33(a), 44 Stat. 1440. Acceptance of compensation resulted in an automatic assignment of the claimant's rights against the third party to the employer. § 33(b), 44 Stat. 1440.

<sup>2</sup> The Fifth Circuit may have been led astray by the fact that *Ingalls'* entitlement to a credit for pre-death settlements pursuant to Section 33(f) was not an issue presented to it. *Yates*, 65 F.3d at 465, n.3.

Any "person entitled to compensation" electing to sue a third party retained the right to be paid compensation by the employer in excess of the third-party recovery. § 33(f), 44 Stat. 1441. However, if the "person entitled to compensation" compromised the third-party action for less than the compensation due, the employer remained liable for further benefits "only if such compromise [was] made with his written approval." § 33(g), 44 Stat. 1441.

In 1959, Congress abolished the requirement that an LHWCA claimant elect between receiving compensation and pursuing a claim against a third party. Public Law No. 86-171, 73 Stat. 391 (1959).<sup>3</sup> The 1959 amendment was designed to relieve hardships faced by injured employees whose need to meet immediate expenses led them to accept compensation rather than pursue an uncertain third-party recovery. S. Rep. No. 428, 86th Cong. 1st Sess. 2 (1959).

In 1972, the LHWCA was extensively amended. Public Law No. 92-576, 86 Stat. 1251. One of the provisions amended Section 33(g) to overrule decisions that had applied an estoppel theory to prevent employers from relying on the approval requirement in some situations. § 15(h), 86 Stat. 1262. In rejecting those holdings, the committee reports explained that the "amendment makes it clear precisely what written approval the person entitled to benefits must obtain and file with the deputy commissioner." S. Rep. No. 1125, 92nd Cong. 2d Sess. 14

<sup>3</sup> The election requirement had been previously limited to cases in which compensation was actually being paid pursuant to an award by a deputy commissioner. Act of June 25, 1938, Ch. 685, §§ 12, 13, 52 Stat. 1168.

(1972); H.R. Rep. No. 1441, 92nd Cong. 2d Sess. 12 (1972). In short, the 1972 amendment to Section 33(g) was clearly intended to *strengthen* the requirement of employer approval of settlements for less than the amount of LHWCA liability.

Despite the demonstrated intent of the 1972 amendments to strengthen the approval requirement, the Benefits Review Board ruled that approval was not required when a claimant was not receiving benefits under the Act at the time of settlement. *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980). In response, the issue received renewed Congressional focus during the process leading to the 1984 amendments.

The first version of changes to Section 33(g)(2) proposed following *O'Leary* appeared in H.R. 7610, Section 21(c),<sup>4</sup> and was described by its sponsor, Representative Erlenborn, as intended

[T]o preserve the employer's compensation lien on amounts received from a third party, whether the employee either enters into a secret settlement with the third party or fails to notify the employer of a third-party award.

House Hearings, *supra*, at 56. Even after hearing the Chairman of the Benefits Review Board express his concern that the increased focus upon employer rights could

<sup>4</sup> H.R. 7610 appears in *Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor* ("House Hearings"), 96th Cong. 1st Sess. (1979), at 43-44.

"lead to injustice" and following consideration of an organized labor proposal that claimants be permitted to settle without employer authorization whenever the employer refused to pay benefits,<sup>5</sup> the Senate Subcommittee further *tightened* the original proposal to assure forfeiture of

[A]ll entitlement to compensation and other benefits otherwise available under this Act whenever a third-party action is resolved without the employers' formal written approval.

S. Rep. No. 498, 97th Cong. 2d Sess. 44 (1982).<sup>6</sup>

S. 1182 died in the House. In 1983, the language providing greater protections to employers was incorporated in renewed proposals. Similar language was included in the House proposal in 1984. *See* 129 Cong. Rec. 16,248, 16,251 (1983); 130 Cong. Rec. 8317, 8321, 8515 (1984). The House Report explained that the changes to Section 33(g) were needed to assure that

[I]f a claimant who has brought a cause of action against a third party enters into a settlement in an amount less than the amount to which the claimant would be entitled under the Longshore

<sup>5</sup> *Longshore and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong. 1st Sess. 209-211, 396.

<sup>6</sup> The changes to H.R. 7610 worked by S. 1182 included placing medical benefits in the category of those subject to forfeiture and relocating the "regardless" phrase to assure that it clearly applied to both "notice" and "written approval" failures. S. 1182 appears at 128 Cong. Rec. 18,023 (1982).



Act, the employer shall be responsible for additional compensation only if the employer has approved the settlement agreement.

H.R. Rep. No. 570, 98th Cong. 1st Sess. Pt. 1, at 30-31 (1983).

The history leaves little room for doubt. Congress *did* intend to create a "brutally direct" scheme which admitted no exceptions. Congress had learned that nothing less would work. The legislative history forced the Director's concession that

[T]he underlying general purpose and plan of § 33(f)-(g) apply to all proceeds of claimants' causes of action for compensable injuries or deaths, regardless of how (with or without instituting proceedings) or when (before or after the cause of action or the entitlement to compensation has arisen, accrued, vested, or been recognized in a formal order) the tortfeasor is ordered or agrees to pay those proceeds.

*Cretan*, Brief for Respondent Director, OWCP, p. 29. Despite this concession, the Director argued to the Ninth Circuit that *Cowart's* "vesting language" foreclosed implementation of Congress' acknowledged goal.

It was because of that response, the demonstrated Congressional intent which it confirmed, and its own recognition that its paramount duty was to give effect to – *not* thwart – Congress' choice of the appropriate policies, that the Ninth Circuit ruled as it did.

The Ninth Circuit was absolutely correct when it concluded that *Cowart* did not mandate a decision wholly at odds with Congress' choices. The Fifth Circuit's focus

upon the *timing* of the settlements led it to overlook the *effect* that Congress had directed be given to them.

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## CONCLUSION

The Fifth Circuit's decision cannot stand scrutiny. It thwarts Congress' clearly expressed purposes and violates what this Court has recognized is the employer's "inviolable right" to the protections Sections 33(f) and (g) were crafted to provide. The decision should be reversed.

DATED: June 27, 1996.

Respectfully submitted,

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Supreme Court, U. S.

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No. 95-1081

In The  
**Supreme Court of the United States**  
October Term, 1995

INGALLS SHIPBUILDING, INC.,

*Petitioner,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT  
OF LABOR, ET AL.,

*Respondents.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit

BRIEF OF THE ASBESTOS VICTIMS  
OF AMERICA AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS

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**BRIEF OF THE ASBESTOS VICTIMS  
OF AMERICA AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENT**

The Asbestos Victims of America ("AVA"), a national, nonprofit organization representing over 20,000 asbestos victims and their families, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court. This case is of significant interest to the AVA, which serves thousands of asbestos victims and their survivors throughout the United States. The AVA assists with the medical, legal, and emotional problems caused by asbestos disease, by preventing future disease through increasing public awareness of the hazards of asbestos exposure, and by ensuring that asbestos abatement procedures eliminate the hazard, rather than create new ones. The AVA is a total support and information center for those suffering from or concerned with asbestos exposure.

Remaining current with information on the state of the law throughout the nation, as it affects asbestos victims, is an AVA priority. Moreover, taking all available steps to ensure that the state of developing law provides compensation to victims who have lost, or are losing, their lives because of asbestos exposure is a critical imperative for the AVA. This case, therefore, attracted our fervent attention. If the Fifth Circuit's decision is reversed, asbestos workers and their families will lose needed compensation, while employers will enjoy an undeserving windfall, contrary to the humanitarian purposes and goals of the Longshore and Harbor Workers' Compensation Act. The AVA urges this Court to consider



its arguments and concerns for the welfare of thousands of asbestos victims and their families.

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### SUMMARY OF ARGUMENT

A. Correct statutory construction of § 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA or "the Act"), 33 U.S.C. § 933(g), is at issue here. Competing interpretations are presented by the employer and longshore claimant: one which unfairly ~~benefits~~ employer and needlessly harms injured workers and their families, versus one which protects the *viable* interests of both employers and longshore claimants. Resolution of this issue is controlled by the U.S. Supreme Court's mandate to defer to the plain language of this statute (*Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992)).

This Court's *Cowart* decision adhered to its strict constructionist principles by confining the LHWCA's § 33(g) involuntary waiver of benefits to persons "entitled to compensation" (or those with vested rights) who enter into third party settlements without the employer's consent, despite the resultant "trap for the unwary." *Estate of Cowart v. Nicklos Drilling Co.*, *supra*, 505 U.S. at 483. By so limiting this harsh forfeiture penalty, the court implicitly excluded from forfeiture, as § 33(g) itself does, persons then not "entitled to compensation" or not yet vested with rights to compensation.

B. The LHWCA's language acts as a guidepost, revealing Congress intended only employees and present claimants to be at risk of forfeiture, encouraging the

pursuit of *viable* actions against third party tortfeasors to achieve full compensation, while protecting the *vested* credit rights of employers. Straining the statutory limitation to persons not yet "entitled to compensation," i.e., the living employee's spouse and children, unfairly gives the employer ultimate approval over settlements of potential wrongful death actions by the employee's spouse, actions which currently have no value. This control is not enjoyed by the employer in the longshore forum, which prohibits settlements of potential death benefits, and was not envisioned in § 33 either.

C. The humanitarian policies inherent in the LHWCA from its inception preclude statutory interpretations which unfairly penalize longshore claimants while giving unfettered and undeserving windfalls to employers. Liberal construction is demanded of the LHWCA in favor of injured workers' recovery to further the Act's "humanitarian purpose," and to avoid "harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); accord, *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 315-316 (1993). In the absence of clear language requiring it, forfeiture of longshore benefits is not warranted by the Act.

### I. ARGUMENT

#### A. Statutory Construction Principles Demand Affirmation

This Court must decide between conflicting interpretations of § 33(g). The Fifth Circuit below adhered to the plain language of § 33(g), which speaks "with great clarity to the precise question raised by this case." *Estate*

of *Cowart v. Nicklos Drilling Co.*, *supra*, 505 U.S. at 483; that is, whether § 33(g)'s forfeiture provisions apply to a spouse at the time she entered into third party settlements but before she becomes a "person entitled to compensation." By contrast, the Ninth Circuit in *Cretan v. Bethlehem Steel Corporation*, 1 F.3d 843 (1994), looked beyond the narrow language of the statute, following instead its perceived policy concerns. Yet, the language of § 33(g) does not yield itself to *Cretan's* more nebulous reading.

In both cases, the circuit courts addressed whether § 33(g)'s forfeiture provision barred a worker's spouse's entitlement to potential longshore death benefits when she joined her husband in entering into third party settlements without his employer's consent, before his death.<sup>1</sup>

<sup>1</sup> Section 33(g) reads:

(1) If the person entitled to compensation . . . enters into a settlement with a third person . . . for an amount less than the compensation to which the person . . . would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation. . . .

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated. . . .

33 U.S.C. § 933(g) (emphasis added).

The Fifth Circuit below answered no, following the *Cowart* court's already provided definition of § 33(g)'s affected class of persons "entitled to compensation." There, this Court addressed whether a longshore employee, injured and claiming entitlement to longshore benefits at the time he entered into unapproved third party settlements, triggered § 33(g)'s forfeiture, framing the question as

Whether *Cowart*, at the time of the *Transco* settlement, was a "person entitled to compensation" under the terms of § 33(g)(1) of the LHWCA.

*Id.* at p. 475 (emphasis added).

*Cowart* contended the key phrase, "person entitled to compensation," encompassed only those persons receiving compensation or recipient of a compensation award. In rejecting this argument, this Court found it need not look any further than the very language of the statute:

The natural reading of the statute supports the Court of Appeal's conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor. Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right. See, generally, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (discussing property interests protected by the due process clause and contrasting an entitlement to an expectancy); Black's Law Dictionary at 532 (6th ed. 1990) (defining "entitle"

as "to qualify for; to furnish with proper grounds for seeking or claiming"). Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. *He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen.* (Emphasis added.)

*Estate of Cowart v. Nicklos Drilling Co.*, *supra*, 505 U.S. at 477.

The Fifth Circuit below followed Cowart's adherence to § 33(g)'s plain language and clear meaning by deciding that the widow at issue, Maggie Yates, could not have been a "person entitled to compensation" subject to § 33(g)'s bar because at the time of the pre-death settlements, her claim for death benefits had not yet vested. Employer contested below, and here, this "natural reading" of § 33(g), presenting the Ninth Circuit's contrary decision, which in identical circumstances rejected this Court's definition of the term "person entitled to compensation," terming it merely *dicta*. Instead, the Ninth Circuit decided a widow and her daughter were persons "entitled to compensation" at the time they settled their civil settlements, before the worker's death, primarily in consideration of perceived purposes of § 33(f), 33 U.S.C. § 933(f). Section 33(f) provides that "if the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section," the employer will receive credit for the net amount recovered

against third persons.<sup>2</sup> The Cretan court rejected Cowart's "person entitled to compensation" definition, arguing that Cowart did not consider "whether a claimant whose entitlement will mature upon a death that has not yet occurred is a 'person entitled to compensation.'" *Cretan v. Bethlehem Steel Corporation*, *supra*, 1 F.3d at p. 846. Unfortunately, the Cretan court erred in failing to abide

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<sup>2</sup> Section 33(f) states in full:

(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the net amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney's fees).

§ 33(b) provides:

(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person, entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within 90 days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.



by the clear language of § 33(g), and § 33(f), and in assuming that a claimant's entitlement will mature upon a death.

In interpreting § 33(g), this Court said it best:

The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.

*Estate of Cowart v. Nicklos Drilling Co.*, *supra*, 505 U.S. at 476. Section 33(g), and § 33(f), do not address their provisions to persons "who may become entitled to compensation," but only to persons actually "entitled to compensation." Importantly, the critical time for considering if the person is encompassed within § 33(g)'s forfeiture provision is when the "person entitled to compensation . . . enters into a settlement with a third person."<sup>3</sup> Of course, "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 112 S.Ct. 1351, 1354 (1992). Section 33(g) focuses on a person presently "entitled to compensation" actually entering into third party settlements. In other words, the clear language of the section addresses only those persons with present entitlement to longshore benefits, not those with a mere expectation. This Court emphasized the point when it held in *Cowart* that the person must have qualified for the right or benefit, "that the person satisfies the prerequisites attached to the right," citing to *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577

<sup>3</sup> This Court agreed in *Cowart*, looking only to the time of the civil settlement in determining if § 33(g) considered the employee a "person entitled to compensation," see *Cowart* at p. 475.

(1972). See *Estate of Cowart v. Nicklos Drilling Co.*, *supra*, 505 U.S. at 477. *Roth* held the 14th Amendment procedural due process protections did not require a hearing prior to the nonrenewal of a nontenured state teacher's contract, in the absence of proof that the nonrenewal deprived the teacher of any protected property or liberty interests. In discussing the distinction between an expectation and an entitlement, the Court's comments are telling:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

*Id.* at p. 577. The Court concluded that the teacher had an "abstract concern in being rehired, but he did not have a property interest . . ." and thus did not suffer deprivation of liberty or property protected by the 14th Amendment. *Id.* at p. 578.

The *Cowart* court's reference to *Roth* is in complete accord with its requirement that a "person entitled to compensation" must be "vested" with rights. A right is "vested" when there is an ascertained person with a present right to present or future enjoyment (*Pearsall v. Great N.R. Co.*, 161 U.S. 646, 656-8 (1896)), that "has been so far perfected that it cannot be taken away by statute" (Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation* (1960) 73 Harv.L.Rev. 692, 696, 698), that it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice (*Cambell v. Holt*, 115 U.S. 620 (1885)).

By contrast, and in conflict with *Cowart*, the *Cretan* court engaged in a more malleable reading of the "person entitled to compensation" language, encompassing persons who could someday qualify for LHWCA benefits, or as the *Cretan* court said, claimants "whose entitlement will mature upon a death that has not yet occurred." *Cretan v. Bethlehem Steel Corporation*, 1 F.3d at p. 846. Of course, § 33(g)'s reference to only those persons "entitled" to compensation rejects the *Cretan* court's more expansive interpretation. Claimants whose entitlement matures upon a death do not become "entitled" to compensation until death, as the Ninth Circuit itself agreed in its 1979 *Todd Shipyards Corp. v. Witthahn*, 569 F.2d 899, 902 opinion, holding that injured workers' deaths give "rise to new claims for relief not in existence during their lifetimes. When they died, . . . their survivors' rights to death benefits first vested, . . ." The First Circuit's *Puig v. Standard Dredging Corp.*, 599 F.2d 467 decision that same year demonstrated the critical consideration the time of death is given, applying the 1972 amendments to the LHWCA's § 909 award of death benefits to a 1975 death claim arising from a 1964 injury. The 1972 amendments provided for payment of death benefits to surviving widows and children if the injury caused death, or if the employee sustained permanent, total disability due to the injury but died from causes other than the injury.<sup>4</sup> The employee died in 1975 from causes unrelated to the injury, and employer controverted the claim for death benefits, relying on § 909 in its pre-1972 state. The First

<sup>4</sup> Section 909 was amended in 1984 to require a connection between the cause of death and injury.

Circuit affirmed the Benefits Review Board's decision that because the right to death benefits arises only upon death and is separate and distinct from the right to disability benefits, § 909 as amended should be applied. The First Circuit well recognized that:

The cases under the Longshoremen's Act have consistently held that the right to death benefits is separate and distinct from the right to disability benefits and does not arise until death occurs. "When death occurs, a new cause of action arises which requires an adjudication on all questions such as accident, notice of death, claim, causal relationship, and dependency." (Citations.)

*Puig v. Standard Dredging Corp.*, *supra*, 599 F.2d at 469. The *Puig* court later confirmed that "the critical time for death benefits is the time of death, when the § 909 right arises."

Section 33(g)'s language makes clear that only those persons actually and presently "entitled" to benefits come within § 33(g)'s forfeiture provisions. Where a statute's meaning is plain, "the Board and reviewing courts 'must give effect to the unambiguously expressed intent of Congress.'" *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 834 (1984); *Holly Farms Corp. v. National Labor Relations Board*, 116 S.Ct. 1396, 1401 (1996). The Fifth Circuit's adherence to the language of § 33(g) follows these well established principles of statutory construction. The Ninth Circuit's attempts to broaden § 33(g)'s harsh bar violate these principles, and the language of the Act itself. Adherence to this Court's own decision in *Cowart* requires affirmation of the Court's decision below.

The *Cretan* court believed it necessary to go beyond the letter of the statute in order to protect an employer's potential credit rights outlined in § 33(f). Yet, Congress did not provide protection for **potential** employer credit, being concerned only with present, vested rights. In its eagerness to protect what it perceived were the overriding purposes of § 33(f) (protect employer's credit rights at all costs), the court went beyond the concerns of Congress, and beyond its role as an interpreter of existing law, as will be explained below.

#### B. Congress Intended to Protect Only Present Rights, Not Employer's Potential Rights

The language of the statute is the guidepost to Congress' intent.

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the Legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases, we have followed their plain meaning.

*U.S. v. American Trucking Associations, Inc., et al.*, 310 U.S. 534, 543 (1939). Section 33, in its entirety, is an inextricably intertwined, remedial scheme designed to protect persons **presently** "entitled" to compensation and, on balance, to protect the employers' equally vested rights to subrogation from third party tortfeasors. When read as an integrated whole, the statute's purpose is clear. Subdivision 33(a) explains that "if on account of a disability or death for which **compensation is payable** under this chapter, the **person entitled to such compensation**

... need not elect whether to receive such compensation or to recover damages against such third person." The claimant plainly may seek both. To ensure the third party action is pursued, subdivision 33(b) assigned the employer "of all rights of the person, entitled to compensation to recover damages against such third person" if the claimant does not sue the third party tortfeasor within six months of acceptance of compensation under an award in a compensation order. Congress' automatic assignment of the claimant's then-rights to sue the responsible third party to the employer who paid the compensation the injured worker accepted, clearly evidences Congress' attempt to balance actual vested rights of the employee, already awarded compensation, with the employer's right to recover against third party tortfeasors the compensation paid. Thus, section 33(b) considers only **present** rights.

Congress' logical outline continues as § 33(c) provides that payment of compensation into the Special Fund established in 33 U.S.C. § 944 (when there is no "person entitled under this chapter to compensation for the death of an employee") operates as an assignment to the employer of the representative of the deceased to recover against a third party tortfeasor. Section 33(d) expressly provides that after the automatic § 33(b) or (c) assignment of rights, the employer may sue or settle with the third party. The assignment flows from the claimant or legal representative's right "to recover damages against such third person," (see § 33(b) and § 33(c)), that is from the "acceptance of compensation under an award in a compensation order" outlined in § 33(b), or the "payment of such compensation into the Special Fund,"



thus, once again, protecting the employer's **present** subrogation rights vested by actual payment of compensation. In other words, the Act balances the claimant's right to and receipt of compensation with the employer's subrogation rights.

Section 33(e) continues the balancing of **present** rights by dividing the proceeds of the employer's successful exercise of the § 33(b) or (c) automatic assignment, and includes a share for the "person entitled to compensation" or the representative. Section 33(e) again shows Congress' sole consideration of **present** rights by envisioning that payments had been made as compensation, see § 33(e)(1)(B), wherein the employer is allowed to retain amounts equal to "the cost of all benefits actually furnished by him to the employee under § 907 of this title (medical benefits)" and § 33(e)(1)(C)'s "all amounts paid as compensation."

Section 33(f) continues the balancing of rights when it opens with "if the person entitled to compensation," relates back to § 33(b), and describes the process when the claimant initiates proceedings against a third person. Section 33(f) includes a provision that ensures that the employer gets a credit, but details the conditions to that credit, that is, "if the person entitled to compensation" "institute proceedings within the period prescribed in subdivision (b) of this section," i.e., commences an action against a third person within six months after acceptance of compensation pursuant to an award in a compensation order. If that condition occurs, the employer has to pay benefits after a reduction by the amount the claimant collected from the third party, less what it cost the claimant to collect.

Section 33(g) provides further detail on the § 33(f) situation, where the claimant, rather than the employer, sues the third person. That detail protects the employer from the potential that the claimant who **presently** has rights to compensation might sell out the employer's **present** right to credit by settling for an amount that is insufficient to repay benefits the employer is liable to the claimant for. That rationale, which permeates the entire statute, simply does not apply if the claimant is not yet entitled to benefits.

Section 33(h) carries Congress' outline of the subject matter a practical step further. The insurer of an insured employer stands in the shoes of the employer with respect to "payment of the compensation" and thus is subrogated to the "rights of the employer." Section 33(i) completes Congress' outline with its provision that there is no right to elect a tort action against a third person who caused the worker's injury if that third party is an officer or employee of the injured worker's employer.

A complete view of § 33 highlights Congress' intent to balance the **present** rights of the employer and claimant. The employer's § 33(g) protected subrogation rights are balanced against the claimant's rights to actual longshore and civil compensation. Section 33 envisioned prompt payment of benefits to the injured worker. In fact, in 1959, Congress amended § 33(a) of the Act. Previously, § 33(a) required the employee to make an election between the receipt of compensation and a damages action against a third person. The 1959 amendments deleted the election of remedies requirement altogether because

existing law was felt to "work a hardship on an employee by in effect forcing him to take compensation under the Act because of the risks involved in pursuing a lawsuit against a third party." S. Rep. No. 428, 86 Cong., 1st Session 2 (1959). The result was that an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit.

*Bloomer v. Liberty Mutual Insurance Company*, 445 U.S. 74, 80 (1979). The court further stated, "Responding to this inequity, the 1959 amendment provided that even when compensation was paid pursuant to an award of the deputy commissioner, the longshoreman's right of action would not be assigned to the stevedore until six months from the date of the award." (*Id.*) Thus, Congress envisioned a claimant presently, and actually receiving benefits to be those § 33 reaches. As the *Bloomer* court stated,

Compensation award was intended to be an immediate and readily available payment to the injured longshoreman. By receiving this payment, the longshoreman was not foreclosed from pursuing an action against the ship owner.

By dealing only with present rights to compensation, and assigning the injured worker's right to sue only after compensation was paid pursuant to an award, Congress clearly limited its employer protections to rights presently accrued, and did not intend to protect through the harsh bar of § 33(g) employer's mere expectancy of credit. Section 33(g), forfeiting the person entitled to compensation's statutory right to benefits, is considered by this Court to be a "forfeiture penalty" which "creates a

trap for the unwary" (*Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. at p. 483). In other words, § 33(g)'s forfeiture provision is a waiver of statutory rights, which, as such, warrants strict construction:

We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.

*Metropolitan Edison Company v. NLRB*, 460 U.S. 693, 708 (1982); see also *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988) ("before deciding whether such a state-law bar to waiver could be preempted under federal law by the parties to a collective bargaining agreement, we would require 'clear and unmistakable' evidence, see *Metropolitan Edison Company v. NLRB*, 460 U.S. 693, 708 (1982), in order to conclude that such a waiver had been intended.")

The § 33(g) waiver limits its "harsh effects" to those rights presently entitled by both the employer and the employee. This limitation corresponds with the Act's concern with only those rights in existence. For example, rights to longshore compensation can be settled, but only compensation to which the claimant is presently entitled. An injured employee can settle his rights to compensation or medical benefits, but not his survivors' rights to death benefits. 20 C.F.R. § 702.241(g).<sup>5</sup> *Cortner v. Chevron*

<sup>5</sup> 20 C.F.R. § 702.241(g) provides in full:

An agreement among the parties to settle a claim is limited to the rights of the parties and to claims then in existence: settlement of disability compensation or

*International Oil Company, Inc.*, 22 BRBS 218 (1989), which invalidated an employee's attempt to settle his spouse's entitlement to survivor's benefits, is instructive. There, employer argued § 908(i) of the Act provided for settlement by "the parties to any claim." The Board responded as follows:

The "party" to the claim for purposes of § 8(i), however, is the employee. His spouse is not a party to the disability claim. During the employee's lifetime, she has no right to file a claim for benefits and the statute does not authorize a person who is not a party to a disability claim to settle any potential or future survivors' claims. The amendments to § 8(i) allow for the settlement of actual claims for benefits brought by survivors following the death of the employee. It is not until death occurs that the right to benefits arises and the potential beneficiaries are identified.

Section 702.241(g) complements the statutory provision, as it explicitly states what is implicit in the statute – that settlement of a claim is "limited to the rights of the parties and to claims then in existence." 20 C.F.R. § 702.241(g). Since claimant was alive at the time of settlement, there was no claim for survivors' benefits in existence at the time of settlement. Thus, both the regulation and the statute prohibit settlement of the right to survivors' benefits before it

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medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivors' benefits.

arises, i.e., before the death of the injured worker.

*Id.* at p. 220. Congress' limitation on settlement of rights thus is confined to rights then in existence, as evidenced in § 8(i) and § 33. *Cretan* went beyond Congress' balancing of present rights, weighing the employer's potential credit rights far above a claimant's potential right to death benefits. Congress clearly did not intend such a disparate disregard for its carefully crafted balance of rights, a balance which must be corrected by this Court.

### C. Liberal Interpretation of the LHWCA Supports the Fifth Circuit Decision

The plain language of the Act and Congress' intent is in harmony with the liberal policies demanded in interpretation of the LHWCA. Congress enacted this humanitarian Act to require

employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to the employer. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and . . . to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted, and, if possible, so as to avoid incongruous and harsh results. (Emphasis added.)



*Baltimore and Phila. Steamboat Company, et al. v. Norton, Deputy Commissioner, et al.*, 284 U.S. 408, 414 (1932); *Voris v. Eikel*, 346 U.S. 328, 333 (1953). In furtherance of these goals, all doubts, factual as well as legal, must be resolved in favor of the injured worker in order "to place the burden of possible error on those best able to bear it." *Jones v. Director, OWCP, U.S. Department of Labor*, 977 F.2d 1106, 1109 (7th Cir. 1992). If any inequity is present in § 33, that inequity must be borne by the employer unless required by the Act:

Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect.

*Edmonds v. Compagnie Generale Transatl.*, 443 U.S. 256, 270 (1979). Specifically, in interpreting § 33(g),

In the absence of language demanding it, construction is not to be favored which visits a forfeiture on the employee or his dependent and gives a windfall to the insurance carrier.

*Bell v. O'Hearne*, 284 F.2d 777, 781 (4th Cir. 1960). The Act's liberal policies and the plain language of the statute do not require a forfeiture be brought upon a person who settles third party potential rights before that person becomes "entitled to compensation."

Public policy also does not support the employer's proposed construction of § 33(g). In cases where this type of situation arises, the employee is injured through the fault of a third party, and pursues a civil action at the same time as the compensation action. The employee and

the spouse are offered a third party settlement which would release all possible actions by both the employee and the spouse. If the spouse does not waive her future rights, the settlement does not go through, the third party defendants wanting to buy their peace once and for all. Consequently, the employee is forced to go to trial against a third party tortfeasor, clogging the courts with cases that need not be tried and costing businesses immense litigation expenses.

On the other hand, if the widow is allowed to settle her potential action without fear of forfeiture, third party actions can be settled, with the employer still receiving the benefit of credit toward its liability for compensation to the employee. This construction is more in line with Congress' intent to balance the rights of the employer and the employee. Moreover, this construction allows the employer and employee to get the benefits of the bargain; that the person entitled to compensation would be allowed prompt payment in exchange for the employer's subrogation rights. Spouses, of course, would not get the benefit of this bargain if their future compensation rights were terminated before they were entitled to payment. Their guarantee of prompt payment is waived before they even become entitled to payment.

The Fifth Circuit's correct construction of § 33(g), which should be used in § 33(f), may confer upon the employer the harsh effect of denial of credit for some wrongful death recoveries made by a potential claimant. However, the Act's language shows Congress' policy choices in extending the bar only to those actually entitled to compensation. As this court said in *Baduracco, et al.*

*v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984):

The cases before us, however, concern the construction of existing statutes. The relevant question is not whether, as an abstract matter, the rule advocated by petitioners accords with good policy. The question we must consider is whether the policy petitioners favor is that which Congress effectuated by its enactment . . . Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.

The fact that Congress intended only to cover those rights in existence is clear through an unbiased reading of §§ 8(i) and 33. Of course, section 33(g)'s provisions may be deemed harsh at times, see *Cowart & Gibson v. ITO Corporation of Ameriport*, 18 BRBS 162 (nothing in § 33(g) compels the employer to consent to settlement or to consider a proposed settlement in good faith), yet this harshness cannot override Congress' plain language and intent:

Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgement of the legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the providence of the legislature. It is Congress that has the authority to change the statute, not for the courts.

*Estate of Cowart v. Nicholas Drilling Co.*, *supra*, 505 U.S. at pp. 483-484.

Any lessons to be learned here are governed by the teachings of *United Brand Company v. Melson*, 594 F.2d 1068 (5th Cir. 1979). There, the Fifth Circuit admitted the LHWCA did not contain any provision allowing employer credit for payments made from a state compensation action. The Fifth Circuit took the correct view:

Under the Act, United Brand is fully liable for Melson's injury. Melson's recovery from Mickenick is a mere fortuity. To allow United Brands a set off is to give United Brands a windfall in the amount of Melson's state award. Until Congress is moved by this unusual situation, we think that the solution to this difficult problem is to allow the windfall of double recovery to reside with the injured worker rather than to allow the set off windfall to accrue to United Brands.

*Id.* at p. 1075. Congress went on to correct this inequity in 1984, when it amended section 903(e) to include a credit against employer liability for benefits paid pursuant to any other workers' compensation law. This court should follow the Fifth Circuit's applaudable restraint and confine itself to its position, that of an interpreter of existing law, not an inventor of law.

## II. CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed, continuing this Court's consistent deference to Congress' intent.

Respectfully submitted,

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